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80-5266

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Whether petitioner, in a trial in which the state sought and obtained the death penalty, was denied due process of law by the trial court's failure to conduct a hearing and make a finding as to his competency to stand trial where the psychiatrists who reported to the court diagnosed petitioner as schizophrenic and were evenly divided in their opinions as to his competency and where there was evidence that petitioner had engaged in bizzare and irrational behavior?

II. Whether petitioner's sentence of death pursuant to a finding of an aggravated circumstance as defined by Ga. Code Ann. § 27-2534.1 (b)(7) without a limiting construction upon the statute by both the trial court in its instructions to the jury and the Georgia Supreme Court in its review of the sentence is violative of the Eighth and Fourteenth Amendments as set forth by this Court in Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759 (1980)?

III. Whether petitioner was denied his Sixth and Fourteenth Amendment rights as construed in Witherspoon v. Illinois when several venirepersons were prematurely excluded for cause upon expressing doubt about whether they could impose a penalty of death without determining whether they could consider the death penalty in this case?

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OPINION BELOW

The decision of the Supreme Court of Georgia is reported at Thomas v. State, ____ Ga. ____, 266 S.E.2d 499 (1980). The opinion is annexed in the Appendix at 1a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 23, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1(b)(7), which provides:

> (7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This case also involves Georgia's statute pertaining to one's competence to stand trial, Ga. Code Ann. § 27-1502, which provides:

> (a) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant, but shall transfer the defendant to the Department of Human Resources.
>
> (b) Within 90 days after the Department of Human Resources has received actual custody of a person pursuant to subsection (a), such person shall be evaluated and a diagnosis made as to whether the person is presently mentally incompetent to stand trial and if so,

> whether there is a substantial probability that the person will attain mental competency to stand trial in the foreseeable future. If the person is found to be mentally competent to stand trial, the department shall immediately report that finding and the reasons therefore to the committing court and the person shall be returned to the court as provided in subsection (e).
>
> (c) If the person is found to be mentally incompetent to stand trial by the Department of Human Resources and there is not a substantial probability that the person will attain competency in the foreseeable future, the department shall report that finding and the reasons therefore to the committing court and the person provided that such person meets the criteria for civil commitment, shall thereupon be civilly committed to a State institution . . . .
>
> . . .
>
> (e) A person who is found by the Department of Human Resources to be mentally competent to stand trial shall be discharged into the custody of a law enforcement officer of the jurisdiction of the court committing such person to the department, . . .
>
> (f) Any person returned to the court as provided in subsection (e) shall again be entitled to file a special plea hereunder.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that court affirming his conviction of murder and his sentence of death in the Fulton County Superior Court.

On May 4, 1979, a Fulton County Superior Court Grand Jury returned an indictment against petitioner, a 19 year old black male with a nineth grade education, charging him with the murder of nine year old Dewey Baugus. App. at 7a. Trial commenced in this matter on October 22, 1979, and after hearing the evidence, the jury convicted petitioner of murder on October 24, 1979. That same day, the jury recommended that petitioner be sentenced to death. On October 25, 1979, the trial court issued an Order of Execution. App. at 51a.

From the outset, there was a question as to the competency of the petitioner to stand trial. Within three weeks of petitioner's indictment, the trial court ordered him examined by the psychiatric staff at Grady Memorial Hospital "for the purpose of determining whether or not he is capable of standing trial and participating in his own defense, and, whether or not Defendant was mentally competent at the time of the alleged offense or offenses." App. at 8a.

The petitioner was first examined pursuant to the Court's order on June 1, 1979, by Dr. Lloyd T. Baccus, M.D., the director of the inpatient psychiatry division of the Psychiatry and Law Service of Grady Memorial Hospital in Atlanta. Dr. Baccus reported to the Court that the petitioner "had no idea of the month or the day," his speech was "characterized by tangential to loose associations," his affect was "markedly flattened" and his mood "depressed." App. at 9a. During the examination, Dr. Baccus reported, the petitioner "became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands." App. at 9a. Because of the petitioner's mental condition, the clinical interview could not be completed and the doctor was unable to elicit any substantial family or personal history. App. at 9a. Dr. Baccus was also unable to offer an opinion as to the petitioner's mental status at the time of the offense because petitioner's "state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense." App. at 9a.

These observations were found by Dr. Baccus to be "clearly indicative of a diagnosis of schizophrenia." He also reported that the petitioner "did not appear to appreciate his role in the proceedings," was "unable to actively participate in the legal proceedings," and was "so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense." App. at 10a.

Upon the basis of Dr. Baccus' report, petitioner entered a special plea of incompetency to stand trial and moved the court to transfer him to the Department of Human Resources for further evaluation.[1] Prior to court action on this motion, petitioner was examined by Dr. Sheldon B. Cohen, M.D. Dr. Cohen reported in a letter to the trial judge that the petitioner "said that he knew he had done something wrong and wanted to get it over with," although he denied any knowledge of the murder. App. at 11a. Dr. Cohen also found the petitioner unable to provide him with "fundamental, historical information about his mother, four brothers and his work history." App. at 12a. Dr. Cohen, however, could not make a definite diagnosis or state an opinion as to the competency of the petitioner. App. at 12a. On August 10, after observing that "the Defendant may be presently incompetent to participate in his defense," the trial court ordered that petitioner be transferred to the Department of Human Resources. App. at 15a. Upon his transfer, an evaluation of the petitioner was conducted by the forensic services division of the Central State Hospital at Milledgeville, Georgia.

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[1] Petitioner, through counsel, filed this motion on June 25, 1979. App. at 13a.

The Court received a letter dated September 24, 1979, from Dr. Jose M. Delatorre, M.D., the medical director of the forensic services division at Central State. The petitioner was described as follows:

> On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process.

App. at 16a. The letter further stated that petitioner's condition had been diagnosed as "latent schizophrenia," but that he was considered competent to stand trial. The letter did not specify the psychological or personality tests administered to the petitioner, the names and professional qualifications of the personnel who evaluated him, the length of his stay at the hospital, or the length and number of observations of the petitioner by qualified mental health professionals. Beyond the paragraph quoted above, the report did not describe in any detail the mental and emotional makeup of the petitioner, how his emotional and intellectual processes work and their effect on his ability to understand the proceedings and communicate with his attorney, or any additional underlying facts upon which the conclusion as to the petitioner's competency was reached.

Despite the conflicting opinions as to the petitioner's competency and the questions raised by the observations contained in the letters of the three doctors to the court, no evidentiary hearing on competency was ever held. Nor were there any judicial findings as to the competency of petitioner to stand trial. Prior to trial the prosecutor inquired of defense counsel whether petitioner would be asserting an insanity defense. Transcript of trial [hereinafter "Tr."] 17. While petitioner entered a general plea of not guilty to his charges, trial counsel remarked that he did not want to waive raising the defense later in the proceeding. Id. Without further comment on the issue of petitioner's competence to stand trial, the case proceeded to trial.

On the day that trial was scheduled to begin, petitioner filed a Motion to Strike and Quash Georgia Statute Providing For Death Qualification Voir Dire Question. App. at 18. One of the stated purposes of this motion was to prevent the state from death qualifying the venirepersons during the voir dire. Petitioner based his motion upon the Sixth and Fourteenth Amendments to the United States Constitution and the interpretation of those Amendments by this Court in Witherspoon v. Illinois, 391 U.S. 511 (1968). The trial court denied the motion. Tr. 14-15.

As the voir dire commenced, each venireperson was questioned individually as to his views on the death penalty. Upon each occasion when the state sought to remove a venireperson for cause based solely upon his view toward capital punishment, trial counsel noted his objection.[2] During this process, several venirepersons were excluded in advance of any showing that they were either unalterably opposed to the death penalty or that such views would prohibit their impartial determination of guilt or innocence.[3]

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[2] Tr. 39, App. at 56, Tr. 75-76, App. at 64-65, Tr. 288, App. at 71.

[3] See citations to the transcript and appendix set out in footnote 2/ above.

At trial, the State presented a circumstantial case. The decedent's mother, Glenda Wilborn, and a playmate, Roosevelt Tysinger, testified that on April 11, 1979, the decedent had accompanied Roosevelt Tysinger to a ball park during the early evening hours. Tr. at 461, 469. On their way home from the field, the two boys parted. This was the last time that Dewey Baugus was seen alive.

The State built its case against petitioner largely upon the testimony of fifteen year old Linda Cook, petitioner's girlfriend, and Enzor Lowe, petitioner's stepfather. Ms. Cook testified that two days after the decedent had disappeared, the petitioner returned to the room they shared with blood on his pants. Tr. at 350.[4/] She stated that petitioner took her to some railroad tracks where he showed her the body of the decedent and claimed he had killed him. Tr. at 352. While they were there, she testified, the petitioner jumped on the body, and then threw it in some bushes. Id. On cross examination, Ms. Cook admitted that she did not report this to the authorities for a week and did so only after she was charged with concealing a death. Tr. at 364-367. She also testified that petitioner had locked her into their room for the week proceeding April 13, leaving her a bucket for her wastes since she had no access to a bathroom. Tr. at 375-377.

Petitioner's stepfather, Enzor Lowe, testified that petitioner had told him on April 13 that he had killed a boy, but that he did not believe petitioner because petitioner was grinning and appeared "high." Tr. at 390.

[4/] The pants identified by Ms. Cook as those worn by petitioner were received in evidence. Tr. at 356, 480. Forensic serologist Linda Tilman testified that the blood on the pants was human blood of international blood group B type. Tr. at 464-465. However, no evidence was offered as to the blood type of the decedent.

A medical examiner testified that the cause of death was asphyxiation due to neck trauma. Tr. at 435. He found both postmortem and antemortem injuries to the body. Tr. at 441, 446-447.

The State had served notice of its intention to seek the death penalty on the first day of trial, indicating that it would attempt to prove that petitioner committed the offense under aggravating circumstances, to wit: "The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." Ga. Code Ann. § 27-2534.1(b)(7). App. at 23a. Prior to trial, petitioner filed a motion to quash as unconstitutional the Georgia statutes providing for the imposition of the death penalty, and their application to this case. App. at 21a. Petitioner objected to the validity and application of the aggravating circumstance statute because it allowed the jury subjective discretion in applying the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972), and the Eighth and Fourteenth Amendments to the Constitution. He also contended that the absence of an objective standard for finding aggravating circumstances eliminated the ability of the Georgia Supreme Court to review effectively his death sentence as required by Ga. Code Ann.§ 27-2537(f) and the due process clause of the Fourteenth Amendment.

Prior to the penalty phase, petitioner again stated his objection to the lack of an objective standard for finding aggravating circumstances which would permit the imposition of the death penalty:

> I would further reraise my objection to the notice of statutory aggravating circumstances served upon me, and that is 27-2534.1 parenthesis 7, on the grounds that it's vague and has no objective standard to be applied in deciding whether that statutory aggravating circumstance exists.

Tr. at 550, App. at 24a. The Court overruled the objection and in addressing the issue of an aggravating circumstance to the jury, instructed as follows:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.

Tr. at 565-566, App. at 26a.

While deliberating upon petitioner's sentence, the jury sent a note to the trial court which indicated the jury was weighing the possibility of sentencing petitioner to life imprisonment. The note said: "May you advise us the soonest a person can be released if given a life sentence?" Tr. at 564, App. at 34a. The trial judge responded that he was not permitted to answer the question. The jury's subsequent verdict recommended a death sentence based on a finding that choking and strangling of a nine year old child causing asphyxiation by the defendant was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind. Tr. at 571, App. at 35a.

Petitioner noted a timely appeal of his conviction to the Supreme Court of Georgia. He asserted that the trial court erred in proceeding to trial without resolving the issue of his competency; that the jury was not selected in accordance with the principles set forth in Witherspoon v. Illinois, supra; that the jury was not provided with an objective standard for determining whether aggravating circumstances existed which would permit imposition of the death penalty; and that the evidence did not support the finding that the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind." Ga. Code Ann. § 27-2534.1(b)(7).

The Georgia Supreme Court affirmed petitioner's conviction. With regard to the competency issue, the Supreme Court held:

> [T]he [trial] court did not find the appellant incompetent to stand trial, but stated . . . that the appellant "may be presently incompetent." The doctors at Central State . . . . certified his competency to stand trial. The appellant was returned to Fulton County . . . and proceeded to trial without objection.

Thomas v. State, ____ Ga. ____, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a.

The Georgia Supreme Court found petitioner's Witherspoon argument equally meritless. Without explaining the scope of its review of the record, the court held:

> It is clear from the voir dire examination that the jurors excused were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings."

266 S.E.2d at 502, App. at 4a.

In reviewing the death sentence, the Georgia Supreme Court upheld the guidance given to the jury, stating, "We have reviewed the trial court's instructions to the jury during the sentencing phase of the trial and find them free of the defects dealt with in Hawes v. State. 240 Ga. 327, 240 S.E.2d 883 [(1977)]; Fleming v. State, 240 Ga. 124, 240 S.E.2d 37 (1977)." 266 S.E.2d at 503, App. at 5a. The court did not elaborate. The Georgia Supreme Court also concluded that "a rational trier of fact was authorized to find beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that in involved torture and depravity of mind. Id.

REASON FOR GRANTING THE WRIT

For the reasons stated in the following section of this petition, petitioner asks this Court to issue a writ of certiorari to review the decision of the Georgia Supreme Court.

I. THE FAILURE OF THE GEORGIA SUPREME COURT TO FIND THAT A DUE PROCESS EVIDENTIARY HEARING WAS REQUIRED BY THE SUBSTANTIAL EVIDENCE OF THE PETITIONER'S INCOMPETENCY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEAL.

Despite information before the trial court which made it abundantly clear that there was a substantial issue as to the petitioner's competency to stand trial, that court failed to conduct an evidentiary hearing and make a determination of petitioner's competency to understand the proceedings against him and properly assist in his own defense.

The question of petitioner's competency arose almost immediately upon his indictment. The trial court received three psychiatric reports before trial which were evenly divided in the opinions they contained as to petitioner's competency. The reports indicated that petitioner suffered from schizophrenia, had difficulty communicating, was at best only "partially oriented," and was of "borderline" intelligence.[5] On the basis of one opinion by a psychiatrist that petitioner was incompetent to stand trial, a special plea of incompetency was entered. At trial, the court heard evidence of bizzare and irrational behavior on the part of the petitioner in locking his girlfriend in a room for a week, showing her the body of the decedent and then jumping on the body.[6] There was also evidence that petitioner admitted killing the decedent to his stepfather, but he was grinning and appeared "high" when doing so and was not believed.[7]

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[5] The three reports appear in the appendix to this brief at 9a-12a, and 16a-17a.

The Georgia Supreme Court rejected petitioner's assertion that he should not have been tried until resolution of the competency issue, basing its decision on the fact that Central State Hospital "certified" his competency to the court and, apparently, its view that petitioner may have waived the issue by proceeding to trial "without objection." Thomas v. State, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a. In doing so, the Georgia Supreme Court sanctioned a marked departure from the holdings of this Court, other state courts of last resort, and federal courts of appeal. Therefore, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

This Court has made it clear that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App. D.C. 117, 120, 223 F.2d 582, 585 (1955). In both Drope and Robinson this Court, although finding that state statutory schemes "jealously guarded" this right,[8/] reversed convictions because of the failure of trial courts to utilize adequate procedures once a question as to the competency of the defendant was raised. The Court pointed to three factors -- evidence of a defendant's irrational behavior, any medical opinions on competence, and a defendant's demeanor at trial -- as being relevant to determining whether further inquiry is required and stated that "even one of these factors standing alone may, in some circumstances, be sufficient." Drope, supra at 180.

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[6] Tr. at 352, 375-377.

[7] Tr. at 390.

In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges and could cooperate with his attorney and the fact that he appeared mentally alert during trial. Id. at 385-86. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created a sufficient doubt of his competency to stand trial to require further inquiry by the trial court. 420 U.S. at 180.

Where there is conflicting documentary evidence on the question of competency, an evidentiary hearing is required. In Bishop v. United States, supra, this Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of a competency question without a hearing on the information before the trial court,

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[8/] Robinson, supra at 385, Drope, supra at 173.

including a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curiam decision, this Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961. In addition, an evidentiary hearing is also necessary, as the Court of Appeals of Oregon has pointed out, to protect other fundamental rights of the accused, such as the rights of cross-examination and confrontation. Brady v. Calloway, 11 Or. App. 30, 36, 501 P.2d 72, 75 (1972).[9/]

Accordingly, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, ___ U.S. ___, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill, 375 N.E.2d 1168 (Mass. 1978); State v.

[9/] A trial court cannot delegate its responsibility to the state hospital to "certify" the competency of a defendant. "Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. . . . " Note, Incompetency to Stand Trial, 81 Harv.L.Rev. 454, 470 (1976). The commentator also points out that "there is repeated evidence that psychiatrists often misunderstand the test of incompetency. . . . Medical opinion about the defendant's condition should be only one of the factors relevant to a determination." Id. [footnotes omitted.]

Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen, 278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without reaching the constitutional question. See, e.g. People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested.[10/]

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. . . . Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the defendant competent to stand trial? It [sic] sole function is to decide whether there is

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[10/] But see also State v. Jemison, 14 Ohio St.2d 47, 236 N.E.2d 538, 540, cert. denied, 393 U.S. 943 (1968), where in interpreting an Ohio statute the court approved of referral to the state hospital to determine the issue of competency without an evidentiary hearing.

> any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. . . .

Moore v. United States, supra at 666. In People v. Pennington, supra, the California Supreme Court held in light of Pate v. Robinson, supra, that its previous interpretation of that state's penal code, which permitted a trial court to resolve conflicting evidence to decide if there was a doubt as to the competency of a defendant, was unconstitutional as applied to a defendant who presented substantial evidence of incompetence. People v. Pennington, supra, 66 Cal.2d at 516-17, 58 Cal. Rptr. at 380, 426 P.2d at 948-49, revising its decision in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1, cert. denied, 361 U.S. 943 (1960).

> [W]hen a defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a . . . hearing as a matter of right under Pate v. Robinson . . . . The judge then has no discretion to exercise. . . .
>
> . . . [O]nce it is determined that a defendant's showing was substantial, it is immaterial that the prosecution's evidence may seem more persuasive. The conflict can only be resolved upon a special trial . . . .

People v. Pennington, supra, 66 Cal.2d at 518-19, 58 Cal. Rptr. at 381, 426 P.2d at 949. The Court found that the opinion of a clinical psychologist that the defendant was incompetent was sufficient to compel a hearing and require reversal of the conviction. Id.

Similarly, in Commonwealth v. Hill, the Supreme Judicial Court of Massachusetts reversed a conviction for failure to hold an evidentiary hearing as to the defendant's competency, even though defendant was convicted in a bench trial and the trial judge made a specific finding of competency. The Supreme Judicial Court observed that the "record fails to disclose, at any time before making the finding that the defendant was competent to stand trial, the judge had either stated or indicated that was conducting a hearing on that issue, or that he was giving the parties the opportunity to present evidence thereon." Id., 375 N.E.2d at 1174.

The Georgia Supreme Court's approval of the failure to conduct a competency hearing in this case is in conflict with these decisions.[11/] There was not only sufficient evidence to create a reasonable doubt as to the petitioner's competency, there was an even division in the opinions of the experts as to petitioner's competency. The report of Dr. Baccus, standing alone, provided a stronger indication of incompetency than was

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[11/] Although Georgia Code § 27-1502(a) provides for a trial on the issue of competency before a "special jury," no such trial was conducted by the trial court below. This was apparently because the prosecution did not object to transfer of the petitioner to the Department of Human Resources, (see petitioner's special plea of incompetency, Appendix at _____, and the court's order transferring petitioner to the department, Appendix at _____,) thereby obviating the need for a finding of incompetency by a special jury to accomplish the transfer as provided in Section 27-1502(a). Subsections (b) and (e) of the statute provide for the return of a person transferred to the Department to the court upon a determination of competency by the Department. Subsection (f) of the statute provides that after return to the court, a person is entitled to again file a special plea of incompetency under the statute.

before the trial courts in either Robinson or Drope.[12/] But of course it did not stand alone. One doctor was unable to reach a conclusion as to diagnosis and competency, the report from the state hospital raised serious questions about the mental health of petitioner, and there was evidence at trial of irrational and bizzare behavior on the part of the petitioner.[13/] Thus, the Georgia courts have failed to "jealously guard" the petitioner's right not to be tried or convicted while incompetent.

The Georgia Supreme Court's rejection of petitioner's assertions regarding competency also appears to be based upon a finding of waiver due to petitioner's failure to object to trial after his return from Central State Hospital. Even assuming that the Georgia court could properly find waiver despite the special plea of incompetency and the evidence before it, a holding that an incompetent defendant can waive his right to a determination of competency constitutes a significant departure from well established authority to the contrary and should be reviewed by this Court.

12/ In neither Robinson nor Drope did the trial court have before it an expert opinion of incompetency. While in those cases there appeared to be sufficient indicia of mental instability to require further inquiry, here the evenly divided opinions of the psychiatrists who examined petitioner squarely presented an issue for resolution to the trial court.

13/ Indeed, the fact that the trial court entered an order stating that "the defendant may be presently incompetent to participate in his defense" and its transfer of petitioner to the state hospital indicates that the court recognized the substantial evidence of incompetency, and, therefore, it was required to conduct an evidentiary hearing. See, Tillery v. Eyman, 492 F.2d 1056, 1059-60 (9th Cir. 1974) (Sweigert, J. concurring).

In Pate v. Robinson, this Court observed, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id. at 384. In his dissenting opinion in that case, Mr. Justice Harlan pointed out that if there were error on the question of competence "such an error is not 'waived' by failure to raise it . . . . Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers." Id. at 388. (Harlan, J., concurring).

State and federal courts have squarely held that the issue of incompetency was not waived by failure to assert it prior to trial where evidence raising a question as to competency was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where, in a case decided before Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so. . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant, unlike petitioner, did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State v. Jensen, supra, 278 Minn. at 216-17, 153 N.W.2d at 342; People v. Livingston, supra, 57 Mich. App. at 726, 226 N.W.2d at 709-10.

Therefore, petitioner respectfully submits that in this case the Georgia courts failed to protect his right not to be tried or convicted while incompetent in violation of the due process guarantee of the Fourteenth Amendment. Because of the importance of the departure by the Georgia courts from the authorities cited herein in the context of this death penalty case, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

II. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT RESTS UPON A FINDING OF THE AGGRAVATING CIRCUMSTANCE DEFINED BY GA. CODE ANN. § 27-2534.1 (b)(7), WHICH, AS CONSTRUED AND APPLIED BY THE TRIAL COURT AND BY THE SUPREME COURT OF GEORGIA VIOLATES THE CONSTITUTIONAL REQUIREMENTS FOR CAPITAL SENTENCING ESTABLISHED BY GODFREY V. GEORGIA, ____ U.S. ____, 100 S.CT. 1759, (1980).

A. The Failure of the Trial Court To Instruct the Jury at the Sentencing Phase of Trial with Clear and Objective Standards that Provide Specific and Detailed Guidance in Applying § 27-2534.1 (b)(7) Violated Petitioner's Eighth and Fourteenth Amendment Rights.

In Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759 (1980), this Court held that a death sentence based upon a finding of an aggravating circumstance defined by § 27-2534.1 (b)(7) of Ga. Code Ann.[14/] cannot stand consistently with the Eighth and Fourteenth Amendments unless a limiting construction is placed upon § (b)(7) by both the jury instructions and the

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[14/] § (b)(7): The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

Georgia Supreme Court.[15] Further, the facts of the case must provide fair evidentiary support for a finding that it falls within the constitutionally accepted narrow construction of § (b)(7). This Court held that a limiting definition of § (b)(7) was necessary to distinguish a case in which the death penalty was imposed from the many cases in which it was not.

As in Godfrey, supra, the trial court's charge to the jury, both orally and in writing, merely quoted to the jury the statutory language of the § (b)(7) aggravating circumstance.[16]

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[15] In view of the Godfrey decision, this Court has remanded several cases back to the Georgia Supreme Court for reconsideration. Baker v. Georgia, 446 U.S.____, 100 S.Ct. ____, 64 L.Ed.2d 820 (1980); Brooks v. Georgia, 446 U.S.____, 100 S.Ct. ____, 64 L.Ed.2d 821 (1980); Collins v. Georgia, 446 U.S.____, 100 S.Ct. ____, 64 L.Ed.2d 820 (1980); Davis v. Georgia, 446 U.S.____, 100 S.Ct. ____, 64 L.Ed.2d 819 (1980); Hamilton v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 821 (1980); Spraggins v. Georgia, 446 U.S. ____, 100 S.Ct. ____, 64 L.Ed.2d 820 (1980).

[16] The trial court instructed the jury as follows:

> The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance.
>
> In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.
>
> If you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances, you may recommend that this defendant be put to death . . . . and you must set forth in writing the aggravated circumstances which you find to exist.

Tr. at 565-569, 597-599, App. at 26a-33a.

The trial court did not instruct the jury on the issue of aggravated battery.

The jury instructions did not attempt to define, delimit or employ a narrowing construction on the statutory language. The instructions did not give the jury any guidance concerning the meaning of any of (b)(7)'s terms. Godfrey also makes clear that the only acceptable limiting definition is one which narrows § (b)(7) so as to require both "evidence of serious physical abuse of the victim before death," 100 S.Ct. at 1766, and a "mental state that . . . led the murderer" to commit such abuse, Id., which must obviously mean that the serious physical abuse was intentionally inflicted. See, e.g. People v. Love, 53 Cal. 2d 843, 856-857, 350 P.2d 705, 711-713 (1960).

Not surprisingly, the jury's verdict was again a mere echo of § (b)(7) when it found that "choking and strangling a 9 year old child asphyxiated by the defendant, was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind."[17/] Jury's sentencing verdict, App. at 35a.

There is nothing in the jury instructions nor in the verdict that implies any restraint on the arbitrary and capricious infliction of the death sentence. Indeed, in explaining why the death penalty imposed in this case was appropriate, the trial judge merely stated in his sentencing report that there was: "Unexplained strangulation of 9-year old child;

[17/] The jury did not find an aggravated battery.

brutality to child's corpse."[18/] Report of Trial Judge at 6, App. at 41a.

It is clear that a proper and specific limiting construction must have been charged to the jury at trial. Godfrey makes plain both the purpose of the sentencing standards demanded by Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), is to "channel the sentencer's discretion," 100 S.Ct. at 1764 [emphasis added], and that the constitutional failing found in Godfrey itself was that the sentencer's discretion had not been so channeled because an unlimited view of the statutory language of § (b)(7) "may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer

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[18/] In another section of the report the trial judge, in answer to the standard question -- "was the victim physically harmed or tortured?" -- replied in the affirmative with the following explanation: "Laceration to head; strangulation marks on neck (causa mortis)." The question and answers are inherently ambigious. If meant to convey whether the victim was physically harmed, obviously the causa mortis explains the injuries. There is no assertion as stated by the trial court's own explanation that the victim was tortured prior to death.

Report of Trial Judge at 6, App. at 41a.

speculation." 100 S.Ct. at 1765.[19] Unless this vice is cured by proper limiting instructions to the jury at the penalty trial, Godfrey invalidates any death sentence based upon a § (b)(7) finding. A narrowing construction placed upon § (b)(7) by the Georgia Supreme Court on appeal would not cure the deficiency, under established constitutional principles. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965); Presnell v. Georgia, 439 U.S. 14 (1978).

The failure to properly instruct the jury was fundamental. For all that appears of record, the jury may have sentenced petitioner to death for a myriad of reasons -- none of which were related to a proper aggravating circumstance. Without the proper education and guidance from the trial court's instructions, the basis for the jury's verdict is impermissibly open to question and speculation.

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[19] There is the distinct possibility that other improper factors may have influenced the jury's verdict under the circumstances. As the trial court's sentencing report indicates, there was extensive publicity in the community concerning the case and yet the jury was not instructed to disregard such publicity. Report of Trial Judge at 6, App. at 41a. Further, although the issue of race was not raised by the defense at trial, racial issues appeared in the trial. Id. Nevertheless, the jury was not instructed to exclude race as an issue. Id. Nor was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence. Id.

B. The Standardless and Unchanneled Discretion of a Basically Uninstructed Jury in This Case Was in No Way Cured by the Affirmance of This Sentence by the Georgia Supreme Court Where the Facts of Record Failed To Disclose Any Serious Physical Abuse or Torture To the Victim Prior To Death or a Concommittant Depravity of Mind in Behalf of the Petitioner.

The Georgia Supreme Court had a duty in light of Furman, supra, Gregg, supra, and Godfrey, supra, to apply a limiting construction upon § (b)(7) in order to channel the sentencer's discretion in its sentencing review on appeal of the case. This is so because the Georgia Supreme Court's review is a constitutionally required safeguard "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (1976), and was relied upon as such by this Court when sustaining the constitutionality of the Georgia statutory procedures in Gregg. Thus the opinion in Godfrey emphasized that the Supreme Court of Georgia had not "applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman in that they involved . . . depravity of mind.'" 100 S.Ct. at 1767. Unless such a construction is employed in the sentencing review conducted by the Georgia Supreme Court, a death sentence based on § (b)(7) cannot stand.

In the instant case, the Georgia Supreme court's failure to place a limiting construction upon § (b)(7) is evidenced by its conslusions of law based on an inadequate factual record.

The facts linking the petitioner to the crime were purely circumstantial. There was no evidence in the record whatsoever that the victim suffered torture or serious physical abuse prior to death. Ante-mortem bruises on the body were caused by strangulation which was the cause of death. Post-mortem bruises, although cited by the Georgia Supreme Court as indicia of "torture of the most sadistic kind," 266 S.E.2d at 503, App. at 5a, do not constitute evidence of torture and should not be considered as such.[20] Further, no evidence either circumstantial or forensic, was introduced to suggest rape or child molestation.[21] Nor was there evidence of a coextensive depravity of mind on the part of the petitioner. The trial judge did not find that the petitioner possessed any specific state of mind at the time of the offense; in fact, the trial court noted in its sentencing report that the strangulation was "unexplained." Report of the Trial Judge at 6, App. at 41a. The petitioner and victim were unacquainted; there was no suggestion of robbery nor was there any scientific or medical evidence to support an inference of a sexually motivated crime.[22/] Nevertheless, the Georgia Supreme Court predicated its affirmance on the sentence of death on two critical facts: upon discovery of the body one week after the offense, the victim's pants were partially removed and evidence adduced at the sentencing phase of trial indicated that petitioner had prior convictions for child molestation and assault with intent to rape. 266 S.E.2d at 503, App. at 5a. The appellate court's reliance on petitioner's prior convictions for non-capital offenses as evidence of his predisposition to not only commit the crime in question, but to commit it with a certain state of mind and in a certain manner is completely speculative and legally impermissible.[23/]

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[20] "'Torture' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." Godfrey v. Georgia, 100 S.Ct. at 1766. [Emphasis added].

[21] Upon discovery of the body one week after the offense, it was discovered that the victim's pants had been partially removed. The record is completely barren of any factual predicate to suggest a sexually motivated offense.

The failure of the Georgia Supreme Court to properly place a limiting construction upon § (b)(7) as mandated by Godfrey v. Georgia, supra, in its sentencing review necessitates a reversal and remand of the death sentence imposed in this case.

[22/] The only set of factual circumstances that would even remotely support an aggravating circumstance under § (b)(7) would be that method of killing the decedent indicated an aggravated battery. As noted supra, the jury was neither instructed on aggravated battery nor did it so find in its verdict.

[23/] It is a principle of long standing that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. See 1 Wigmore Evidence §§ 192-94 (3d ed. 1940); McCormick, Evidence § 157 (2d ed. 1972); 1 Underhill, Criminal Evidence §§ 205-12 (5th ed. 1956); Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

III. PETITIONER'S SENTENCE OF DEATH WAS IMPOSED BY A JURY SELECTED IN CONTRAVENTION OF THE PRINCIPLES ANNOUNCED IN WITHERSPOON V. ILLINOIS.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Adams v. Texas, 48 U.S.L.W. 4869, 4870 (June 25, 1980). In holding that only venirepersons who maintain unalterable views toward the death penalty may be excluded pursuant to due process, the court stated:

> Veniremen cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death penalty cannot be carried out, even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.

391 U.S. at 522 N.21 [emphasis in original].

Since the announcement of Witherspoon, this Court has repeatedly vacated penalties of death where the record did not unequivocally establish that Witherspoon standards were expressly satisfied.[24] Just this past term, the Court struck down a practice which permitted the state to strike a venireperson for cause if he could not pledge that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Adams v. Texas, supra. (Some venirepersons were struck because they indicated the death penalty would affect their deliberations as it would increase the gravity of such deliberations while others were struck because "they were unable positively to state whether or not their deliberations would in any way be affected." 48 U.S.L.W. at 4871. In Boulden v. Holman, 394 U.S. 478 (1969), this Court held that the fact that some venirepersons acknowledged that they held fixed opinions against capital punishment was insufficient to satisfy Witherspoon as such jurors "might nevertheless be perfectly able as a juror to abide by existing law to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." 394 U.S. at 484. And in Davis v. Georgia, 429 U.S. 122 (1976), this Court held that even the exclusion of one venireperson in the absence of a showing that the venireperson was "irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings" rendered the sentence of death unconstitutional. 429 U.S. at 123. It is in light of this historical commitment to the command of Witherspoon that petitioner submits that several venirepersons were wrongfully excluded for cause from his jury.

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[24] Davis v. Georgia, 429 U.S. 122 (1976); Aiken v. Washington, 403 U.S. 946 (1971); Adams v. Washington, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); Jaggers v. Kentucky, 403 U.S. 946 (1971); Childs v. North Carolina, 403 U.S. 948 (1971); Quintana v. Texas, 403 U.S. 947 (1971); Tajra v. Illinois, 403 U.S. 947 (1971); Whan v. Texas, 403 U.S. 946 (1971); Speck v. Illinois, 403 U.S. 946 (1971); Mathis v. New Jersey, 403 U.S. 946 (1971); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

Early into petitioner's voir dire, venireperson Francis Ogletree was questioned about her views toward capital punishment.[25/] When asked whether she was opposed to the death penalty, she responded in the affirmative, but clearly maintained that she would not automatically exclude its consideration and would consider the evidence of the case. With regard to whether these views would prevent her from making an impartial decision upon guilt or innocence, the simply responded "I'm afraid it would." Over the objection of defense counsel, the trial court excused Mrs. Ogletree from petitioner's venire.

It is clear that Francis Ogletree was not unalterably opposed to the death penalty and her cryptic retort to the impartiality question hardly can be interpreted to mean only that she was certain she would not be impartial. Her response was of the character which this court has found insufficient for Witherspoon purposes on other occasions. See Wilson v. Florida, 403 U.S. 947 (1971) (reversing Wilson v. State, 225 So.2d 321 (Fla. 1969) (scruples "very well might" affect his verdict; "I believe I would have difficulty" in finding defendants guilty if the penalty may be death); Pruett v. Ohio, 403 U.S. 947 (1971)

[25/] Tr. at 37-39, App. at 54a-56a.

(reversing State v. Pruett, 18 Ohio St.2d 167, 248 N.E.2d 605 (1969) (scruples "very well might" affect his verdict; "I believe I would refuse to return a verdict of guilty where the penalty was death"). Additionally, she was not asked by the court whether inspite of her views she could follow an instruction that she consider only the evidence presented at trial to determine petitioner's guilt. Because Mrs. Ogletree's exclusion was, in the least, premature, petitioner's rights pursuant to Witherspoon were infringed.

In another instance, the court, over defense objection, struck venireperson Joyce Beachum despite several assurances that she was not irrevocably opposed to the death sentence and could be impartial with regard to petitioner's guilt or innocence. Tr. at 68-76, App. at 57a-65a.

When first asked about her views on the death penalty by the court, Mrs. Beachum responded that she had never thought about it. Upon being asked whether she would automatically vote against imposition of the penalty she stated, "No." She then retorted that her attitude would not prevent her from making an impartial decision upon guilt or innocence.

Not satisfied with these responses, the prosecutor asked a series of questions in the vein of whether Mrs. Beachum could "write out a death sentence on a person." While stating she didn't think she could write it out or help impose it,[26/] she did say she could "consider imposing it" but could not vote

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[26/] It is not clear what the prosecutor had in mind with the phrase"imposing it" and it is certainly not clear how Mrs. Beachum interpreted it.

for it.

Upon questioning by defense counsel, Mrs. Beachum then simply stated she was conscientiously opposed to capital punishment. Once again the court sought to determine Mrs. Beachum's true attitudes.

> Court: . . . is your view of the death penalty such that under no circumstances would you ever vote to impose the death penalty?
>
> Mrs. Beachum: No.
>
> Court: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?
>
> Mrs. Beachum: Yes.

Tr. at 72, App. at 61a.

The court then reminded Mrs. Beachum that capital punishment in Georgia meant electrocution and she responded that she understood. And finally, after again being asked the impartiality question, she again responded, "I think I could make a fair judgment." Tr. at 73, App. at 62a.

At this point, the government reasserted its claim that Mrs. Beachum should be struck for cause whereupon defense objection, the court proceeded with further inquiry. Again, Mrs. Beachum asserted that she could impose the death penalty, if it was the last alternative. Finally, in response to the court's question of whether there was any case she could conceive of where she would vote to send someone to the electric chair, she responded, "No."

The court understood this last answer to mean Mrs. Beachum was unalterably opposed to capital punishment ("I know what she has done. She has said three or four different things, but the last time she said she could not.") Tr. at 75, App. at 64a. Upon the government's motion to strike for cause, the court granted the motion and commented:

> Well, I think, as a matter of fact, I will strike her for cause, and I will have to do that as I understand the law. I agree with you that she is quite ambiguous about it, but when it comes down to talking about sending someone to the electric chair to be executed her ambiguity seems to fade away.

Tr. at 76, App. at 65a. [Emphasis added].

Despite her repeated assurances that she could be impartial and could impose the penalty, the court chose to disregard these clear indicia of Mrs. Beachum's attitude and found her irrevocably opposed to the death penalty on the basis of his last inquiry. Yet the court did not ask her whether she was unalterably opposed to the death sentence during his final questions; he instead asked her whether she could conceive of a case where she would vote for the sentence of execution. In responding no, Mrs. Beachum's inability to immediately provide an example does not necessarily indicate that she could never vote for capital punishment. Indeed, in light of her prior answers, Mrs. Beachum's response can best be interpreted only to mean that at that moment she could not describe a case where she would, without doubt, vote for the sentence of execution. Whether a juror can dream up a circumstance which would warrant capital punishment is not the question. It is instead whether the attitude of the juror will preempt altogether any consideration of the death penalty or interfere with an impartial determination of guilt or innocence. With regard to these two inquiries, Mrs. Beachum was clear: she was not irrevocably opposed to the penalty and she could be impartial. The court's striking her for cause thereby offended petitioner's rights pursuant to Witherspoon.

The venireperson next examined after Mrs. Beachum was Eddie Watkins. While he proferred that he was opposed to capital punishment, he clearly indicated "I wouldn't automatically vote against it". Tr. at 77, App. at 66a. While Mr. Watkins did indicate reluctance to sentence one to be electrocuted, he stated that he could be impartial at arriving at guilt or innocence. When the court interpreted Mr. Watkins' reluctance to vote for electrocution as reflecting his inability to consider it in any case, Mr. Watkins indicated that he would not vote for a sentence if it meant electrocution. Immediately after excusing Mr. Watkins, the court remarked that he was going to begin to announce to each group of venirepersons as they waited for voir dire that they would be questioned about the death penalty "so that they can be thinking about that, and don't get hit, maybe, cold." Tr. at 78, App. at 67a. This comment, as it followed Mr. Watkins' contradictory remark, indicates that the court felt Mr. Watkins and earlier jurors might not have fully understood what they were being asked. It goes without saying that if that was the case, then the response of any juror prior to this point in the voir dire is suspect as to its reliability. And certainly, Witherspoon standards cannot be satisfied by an ambigious and unreliable record.

Several other jurors were also struck for cause based upon less than convincing testimony that they would never vote for the death penalty or would not be impartial. Christine Reese indicated general opposition to the death penalty yet clearly responded to questions from the court that she could consider voting for the death penalty and that her views were not so strong as to prevent her from being fair and impartial. Tr. at 286, App. at 69a. However, when asked by the government whether she could "vote to sentence someone to the electric chair at Reidsville", Ms. Reese simply responded, "No ma'am." Tr. at 288, App. at 71a. Without any further inquiry and over objection, the court excused Ms. Reese.

To say the least, Ms. Reese's excusal was premature. She had stated she could be impartial and would consider the death penalty. It was only in response to the question concerning the electric chair did she indicate that she would not vote for the death penalty. So, at best, the court found her unalterably opposed upon a contradictory record. She was not asked whether she could dutifully follow an instruction that as a juror, she must follow the laws of the State of Georgia which would obligate her to consider imposition of the penalty. The excusal of Christine Reese accordingly violated the dictates of Witherspoon.

Evelyn Thompson exhibited similarly ambivilant yet hardly unalterable views toward the death penalty as did Christine Reese. After first indicating that she was not sure about what capital punishment meant, she indicated that she was opposed to electrocution in the electric chair. Tr. at 113, App. at 72a. When next asked whether she would automatically vote against imposition of the sentence, she responded with a clear "no". Tr. at 114, App. at 73a. The court then proceeded to determine her ability to be impartial. To this line of questioning, she responded with uncertainty:

> Court: Now, would your attitude toward the death penalty prevent you from making an impartial decision as to the question of guilt or innocence?
>
> Juror: I really don't know, at this point.
>
> Court: . . . Now, I am asking you, would your attitude on capital punishment render you unable to make an impartial decision as to the question of guilt or innocence?
>
> Juror: I'm afraid it would.

Tr. at 114, App. at 73a.

Without further inquiry to examine whether "I'm afraid it would" equalled "I'm positive it would", Mrs. Thompson was, over objection, struck for cause. This amounts to premature exclusion because Witherspoon requires a more thorough determination as to whether a venireperson's views toward capital punishment will prevent an impartial approach to the question of guilt or innocence. See Wilson v. Florida, supra; and Pruett v. Ohio, supra.

In summary, petitioner was denied his Sixth and Fourteenth Amendment rights in that numerous venirepersons were excluded from his jury simply because they expressed varying degrees of doubt about whether they could vote to impose a sentence of death upon another human being. The Constitution, as interpreted in Witherspoon through Adams v. Texas, permits such exclusion only if the venireperson clearly indicates a total repudiation of the penalty or an unalterable view that such feelings will preclude an impartial decision upon the merits of the case. As this Court has repeatedly stressed the clear parameters of Witherspoon, petitioner prays that this Court grant his petition and summarily reverse his sentence of death.

CONCLUSION

Petitioner prays that a writ issue to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

Russell F. Canan

Russell F. Canan
George H. Kendall
CANAN, BURNS & O'TOOLE, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 347-5212

Dated August 21, 1980

Stephen B. Bright

Stephen B. Bright
635 F Street, N.W.
Washington, D.C. 20004
(202)638-4798

ATTORNEYS FOR PETITIONER

RECEIVED
AUG 21 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5266

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN THIS COURT *IN FORMA PAUPERIS*

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action *in forma pauperis*. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully sumbitted,

Russell F. Canan

Russell F. Canan

80-5266

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SUPREME COURT, U.S.

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT OF ATTORNEY IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Russell F. Canan, being first duly sworn, deposes and states that I am the attorney for the petitioner in the above entitled matter, that in support of petitioner's motion to proceed in this action for a writ of certiorari to the Supreme Court of Georgia without being required to prepay fees, costs or give security therefor, I state that because of petitioner's poverty he is unable to pay the costs of said proceeding or to give security therefor.

I further swear that the information stated below regarding the ability of petitioner to pay the costs of proceeding herein are true:

1. The petitioner is not presently employed. He has been incarcerated since May, 1979. Prior to that time,

petitioner, who is 19, had various odd jobs, but no regular employment.

2. Petitioner has received within the past twelve months no income from a business, profession or other form of self-employment. He has received nothing in the form of rent payments, interest, dividends or moneys from any other source.

3. Petitioner has no cash and has no checking or savings account.

4. Petitioner owns no real estate, stocks, bonds, notes, automobiles, or other valuable property excluding ordinary household furnishings and clothing.

5. There are no persons who are dependent upon the petitioner for support.

Russell F. Canan
Russell F. Canan

Subscribed and sworn to before me this 21st day of August, 1980, by Russell F. Canan.

Shirley E. Parker
Notary Public

My Commission expires:
My Commission Expires June 14, 1984

RECEIVED
AUG 21 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

DONALD WAYNE THOMAS,
Petitioner,
-v-
STATE OF GEORGIA,
Respondent.

NO.__________

AFFIDAVIT OF POVERTY

I, DONALD WAYNE THOMAS, the above-named Petitioner, do hereby make solemn oath that I am without and cannot obtain the money with which to pay the filing fees, court costs, cost of recording and printing the transcript and other costs in defending this action. I own no property other than personal effects of little or no value.

Donald W. Thomas
DONALD WAYNE THOMAS

STATE OF GEORGIA
COUNTY OF FULTON

Sworn to, and subscribed before me,

this the 15th day of May, 1980.

Harriet P. Morris
Notary Public

My Commission expires:

Notary Public, Georgia, State at Large
My Commission Expires June 13, 1982

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RUSSELL F. CANAN
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ATTORNEYS FOR PETITIONER

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The opinion of the Supreme Court of Georgia is reported as follows at 266 S.E.2d 499:

THOMAS
v.
The STATE.
No. 36046.
Supreme Court of Georgia.
Argued March 12, 1980.
Decided April 23, 1980.

Defendant was convicted on a jury verdict before the Fulton Superior Court, Weltner, J., of murder and was sentenced to death, and he appealed. The Supreme Court, Marshall, J., held that: (1) evidence was sufficient to support conviction; (2) trial court did not err in excusing jurors who were irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings; (3) death qualification voir dire question did not violate defendant's right to an impartial jury and was not unconstitutional; (4) defendant was not put to trial while still under outstanding order of incompetency; (5) defendant waived his right to appeal any error in trial court's instruction to the jury to scan with care any incriminating statements made by witness; and (6) evidence supported jury's finding that the murder was outrageously and wantonly violent and inhuman in that it involved torture and depravity of mind so as to support imposition of the death penalty.

Judgment affirmed.

Hill, J., filed concurring opinion.

1. Criminal Law ⚿742(1)

Credibility of witnesses is matter left to the jury. Code, § 38-1805.

2. Homicide ⚿250

Evidence, viewed in the light most favorable to the verdict, supported finding by rational trier of fact of essential elements of crime of murder beyond a reasonable doubt.

3. Jury ⇨108

In prosecution for murder, trial court did not err in excusing jurors who were irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. Code, § 59-806, subd. 4.

4. Jury ⇨131(8)

In prosecution for murder, "death qualification voir dire question" did not violate defendant's right to impartial jury on ground that it excluded identifiable segment of the community. Code, § 59-806, subd. 4.

5. Jury ⇨84

Statute providing for "death qualification voir dire question" is not unconstitutional on the ground that it does not meet constitutional standards of specificity and clarity in determining view of potential juror toward the death penalty. Code, § 59-806, subd. 4.

6. Criminal Law ⇨1213

Georgia death penalty statute is not unconstitutional.

7. Witnesses ⇨306

Privilege against self-incrimination is that of the person under examination as a witness and is intended for his protection only; defendant on trial had no standing to raise the issue.

8. Witnesses ⇨296

Witness cannot refuse to testify relative to material matters concerning crime committed by member of his family on basis that his answer would bring disgrace, infamy, or public contempt upon him or his family. Code, § 38-1205(a).

9. Mental Health ⇨6

Where, in response to a special plea of insanity, defendant was examined by two psychiatrists who tendered conflicting reports, defendant was then transferred for examination by hospital staff by the court which stated that the reason for the transfer was that defendant might be presently incompetent, and doctors at state hospital, after examining the defendant, certified his competency to stand trial, defendant was not put to trial for murder while still under outstanding order of incompetency.

10. Criminal Law ⇨1137(1)

Where defense counsel requests giving of certain jury charge but agrees to trial judge's giving of another charge in lieu thereof, any error in the charge given is in effect induced and cannot be complained of on appeal.

11. Criminal Law ⇨1137(1)

Defendant would not be permitted to assert on appeal error in jury instruction, where trial judge informed defense counsel that he would instruct the jury to scan with care any incriminating statements made by witness, but the term "confession" would not be used in the jury instructions, and defense counsel agreed to the trial judge's giving of this modified version of defendant's requested charge.

12. Criminal Law ⇨1206(2)
Homicide ⇨354

Evidence which showed brutal strangulation murder of nine-year-old victim who weighed less than 60 pounds and admission by defendant to witness that defendant had killed the child by beating him with a stick and choking him to death supported jury's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind, so as to support imposition of the death penalty; sentence to death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code, §§ 27-2534.1(b)(7), 27-2537(c)(1-3).

Jack Dorsey, Atlanta, for appellant.

Lewis R. Slaton, Dist. Atty., Carole E. Wall, Asst. Dist. Atty., Arthur K. Bolton, Atty. Gen., W. Davis Hewitt, Asst. Atty. Gen., for appellee.

MARSHALL, Justice.

Donald Wayne Thomas, the appellant, was convicted in Fulton County Superior Court of the April 19, 1979, murder of Dewey Baugus, a nine-year-old child. He was sentenced to death, and this is his appeal.

From the evidence introduced at trial, the jury was authorized to find the following facts:

On April 11, 1979, Dewey Baugus and a playmate left his mother's home on Primrose Circle in Atlanta to go to a ball game. After the game, the two children separated to return to their respective homes in the early evening darkness. This was the last time the victim was seen alive.

The appellant, a 19-year-old male, lived at a rooming house on Primrose Circle. Linda Cook, the appellant's girlfriend, had stayed with him for approximately a week during the time in question. The appellant had kept her locked in the room when he was not there, with a bucket he provided as her only toilet facility. Linda Cook testified that when the appellant returned to the room on Friday, April 13, she noticed that he had a lot of blood on the front of his pants. The appellant took her to the railroad tracks behind Primrose Circle and showed her the body of the victim, lying face down, and told her that he had killed the child by beating him with a stick and choking him. In her presence, the appellant rolled the body over. Telling her that he had to make sure that he was dead, the appellant then jumped on the neck of the victim. Thereafter, he threw the victim's body in the bushes. Thereafter, they returned to the room, where the appellant removed his pants and hid them behind the house. That same day, the appellant, again in Linda Cook's presence, admitted the murder to his stepfather, Enzor Lowe. However, his stepfather testified that he did not believe him, because the appellant was grinning about it.

On April 19, 1979, Calvin Banks discovered the body of the victim when he took a shortcut on his way back from applying for a job at the Dolly Madison Cake Co. When the body was discovered, it was partially decomposed, and the pants the victim was wearing were pulled down to mid-thigh level.

Sometime later, after she had stopped staying with the appellant, Linda Cook contacted the authorities and related what had occurred. She was charged with concealing a death and placed in juvenile detention. She pointed out to the authorities where the appellant had discarded his pants, and they were recovered. Crime Laboratory tests confirmed that the blood on the appellant's pants was human, International Type B. The blood type of the victim could not be established due to decay.

Autopsy results showed the cause of death as asphyxiation, and that numerous post- and ante-mortem bruises were on the body.

[1] In enumerations of error 1, 2 and 10, the appellant urges the general grounds. He argues that the evidence does not support the verdict in that the evidence was circumstantial and did not exclude every reasonable hypothesis save the guilt of the accused. However, the jury was fully charged on circumstantial evidence and the reasonable-hypothesis rule pursuant to Code § 38-109. We do not find from the evidence, or from the lack of evidence, an hypothesis pointing to the innocence of the accused. *Douthit v. State*, 239 Ga. 81(1), 235 S.E.2d 493 (1977). See *Hawes v. State*, 240 Ga. 327(3), 240 S.E.2d 833 (1977); *Corn v. State*, 240 Ga. 130(5), 240 S.E.2d 694 (1977). The credibility of witnesses is a matter left to the jury. Code § 38-1805; *Turner v. State*, 235 Ga. 826(1), 221 S.E.2d 590 (1976).

[2] We find that the evidence, viewed in the light most favorable to the verdict, supports a finding by a rational trier of fact of the essential elements of the crime of murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Fleming v. State*, 236 Ga. 434, 224 S.E.2d 15 (1976).

[3] 2. The appellant contends in his third and eighth enumerations of error that the trial court erred in excusing jurors who were conscientiously opposed to the death penalty and in overruling the appellant's motion to "strike or quash" the Georgia statute providing for death-qualification voir dire questions (Code Ann. § 59–806(4)). We do not agree. It is clear from the voir dire examination that the jurors excused were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694, supra; *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977).

[4] The appellant's assertion that the "death qualification voir dire question" (Code Ann. § 59–806(4)) violates the defendant's right to an impartial jury in that it excludes an identifiable segment of the community, has been raised numerous times before this court, and in each instance has been rejected. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694, supra; *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493, supra; *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976).

[5] The appellant's contention that Code Ann. § 59–806(4) is unconstitutional in that it does not meet the constitutional standards of specificity and clarity in determining the view of the potential juror toward the death penalty, is clearly without merit, as the statute must be construed in light of the applicable case law. *Witherspoon v. Illinois*, supra. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[6] 3. The constitutionality of the Georgia death penalty statute has been upheld by the Supreme Court of the United States and by this court each time it has been attacked on constitutional grounds. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729, supra, and cits. The appellant's ninth enumeration of error is without merit.

[7, 8] 4. The appellant made a motion for the court in camera to inform witness Enzor Lowe of his privilege not to testify as to matters which may incriminate himself or which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family. Code § 38–1205(a). The appellant argues that, since the witness was the stepfather of the appellant, the stepfather's testimony as to the murder would bring infamy upon a member of his household and the court should have instructed him in this regard. However, this enumeration is without merit for two reasons. First, the privilege against self-incrimination is that of the person under examination as a witness, and is intended for his protection only; the defendant on trial has no standing to raise the issue. *Lively v. State*, 237 Ga. 35, 226 S.E.2d 581 (1976) and cits. Second, the privilege would not apply to the testimony of the witness in this case, in that a witness cannot refuse to testify relative to material matters concerning a crime committed by a member of his family on the basis that his answer would bring disgrace, infamy or public contempt upon him or his family. *Brooks v. State*, 233 Ga. 524(2), 212 S.E.2d 355 (1975).

[9] 5. The appellant complains that he was put to trial while still under an outstanding order of incompetency. However, the record does not support such a contention. In response to a special plea of insanity, the appellant was examined by two psychiatrists, who tendered conflicting reports. The court thereafter ordered that the appellant be transferred to the custody of the Department of Human Resources in order that he could be examined by the staff at Central State Hospital. In its order, the court did not find the appellant incompetent to stand trial, but stated that the reason for the transfer was that the appellant "may be presently incompetent." The doctors at Central State, after examining the appellant, certified his competency to stand trial. The appellant was returned to Fulton

County, tendered a plea of not guilty, and proceeded to trial without objection. The appellant's fifth enumeration of error is therefore without merit.

6. In his seventh enumeration of error, the appellant assigns error to the court's failure to charge, in the language requested, the appellant's request to charge number 12, which reads as follows: "All statements shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify conviction."

The appellant did not give any statements to law enforcement authorities; nor did he testify at trial. The appellant did make certain admissions to Linda Cook and his stepfather concerning his commission of the murder, and their testimony concerning these admissions was received at trial.

[10, 11] Prior to closing argument, the trial judge informed defense counsel that he would instruct the jury to scan with care any incriminating statements made by Linda Cook, but the term "confession" would not be used in the jury instructions. Defense counsel agreed to the trial judge's giving of this modified version of defendant's request to charge number 12. Therefore, he cannot complain on appeal. Where defense counsel requests the giving of a certain jury charge, but agrees to the trial judge's giving of another charge in lieu thereof, any error in the charge given is in effect induced. Induced error cannot be complained of on appeal. *Hill v. State*, 237 Ga. 523(3), 228 S.E.2d 898 (1976).

[12] 7. *Sentence Review.* As required by Ga.L.1973, p. 159 et seq. (Code Ann. § 27-2537(c)(1-3)) and to complete our consideration of the appellant's enumerations of error, we have reviewed the death sentence in this case, as we review each case in which a death sentence is imposed. We have considered the aggravating circumstance found by the jury and the evidence concerning the crime and the defendant. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor, and is factually substantiated.

The jury in returning the death sentence found the following statutory aggravating circumstance: That the strangling of a nine-year-old child was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind. Code Ann. § 27-2534.1(b)(7). The appellant, in his sixth enumeration of error, argues that the evidence does not support such a finding. We do not agree. The evidence shows a brutal strangulation murder of a nine-year-old child who weighed less than 60 pounds. The appellant admitted to Linda Cook that he had killed the child by beating him with a stick and choking him to death. The autopsy report showed numerous post-mortem bruises and lacerations. The appellant had a large amount of blood on the front of his pants when he returned to the room where he kept Linda Cook. The victim's pants had been partially removed and the state introduced the defendant's prior record for child molestation and assault with intent to rape during the pre-sentence hearing. Nothing could be more inhuman, depraved or outrageously vile than the killing of a helpless child under these circumstances. This child's murder certainly involved torture of the most sadistic kind. From this evidence, a rational trier of fact was authorized to find beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind. *Jackson v. Virginia*, supra. See *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979).

We have reviewed the trial court's instructions to the jury during the sentencing phase of the trial and find them free of the defects dealt with in *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, supra; *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which life or death sentences were imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty. The appellant's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX.

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Presnell v. State*, 243 Ga. 131, 252 S.E.2d 625 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 909 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980).

HILL, Justice, concurring.

The defendant requested that the jury be instructed substantially in accordance with Code § 38-420 regarding "confessions." The trial court charged the jury as to "incriminating statements."

For the last 100 years, defendants have been complaining that the defendant was prejudiced by the court's charging the jury as to "confessions." *Johnson v. State*, 242 Ga. 822, 824, 251 S.E.2d 563 (Hill, J., concurring) (1979). Here the defendant requested a charge on "confessions."

While I concur in Division 6 of the majority opinion, I would go further and hold that a defendant cannot complain that the trial court charged on "incriminating statements" rather than on "confessions"; i. e., that the trial court charged that incriminating statements should be scanned with care and shall be received with great caution.

In the case at bar, the defendant's statements were more than amply corroborated by the blood on defendant's clothes and by his taking Linda Cook to view the body. I therefore concur in the judgment.

STATE OF GEORGIA, COUNTY OF FULTON.

IN THE SUPERIOR COURT OF SAID COUNTY.

THE GRAND JURORS selected, chosen and sworn for the County of Fulton, to-wit:

1. DONALD N. THOMPSON, Foreman
2. JOHN L. BRIDGES, Assistant Foreman
3. CARLENE THOMAS, Secretary
4. J.D. MABRY, Assistant Secretary
5. ~~P. B. ANDREWS~~
6. BETTY W. BANKS
7. VERDEL BARBER
8. BETTY BARRON
9. J. DAVID BERRY
10. EUGENE BIBBS
11. ETHYL SUE BIGBY
12. CHARLES WILLIAM BOROUGHS
13. RICHARD Q. BOYLES
14. KATHRYN J. BROUGHTON
15. SETH DORIAN
16. ESSIE R. GARNETT
17. JAMES J. JONES
18. RICHARD R. LOWRIE, IV
19. FRANK MIDDLEBROOKS
20. MELVIN OLIVE
21 ERNEST STAFFORD
22. WALTER H. TRIPOD
23. SARAH SAMS WEAVER
24. ~~RUTH J. BENDER (1st. Alternate)~~
25. ~~DEE ANN STONE (2nd Alternate)~~

in the name and behalf of the citizens of Georgia, charge and accuse

DONALD WAYNE THOMAS

with the offense of:—

MURDER

for that said accused, in the County of Fulton and State of Georgia, on the

19th day of April, 19 79

did unlawfully and with malice aforethought, cause the death of Dewey Baugus a human being, by choking and strangling him causing axphyxiation;-

contrary to the laws of said State, the good order, peace and dignity thereof.

LEWIS R. SLATON, District Attorney

Special Presentment. BOOK 674 PAGE 1

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

THE STATE) INDICTMENT NO. A-44518
VS.)
DONALD WAYNE THOMAS) **ORDER**

It is hereby ORDERED that a psychiatric evaluation be permitted of the Defendant, DONALD WAYNE THOMAS, who is charged with murder, at the Fulton County Jail by the Grady Memorial Hospital Psychiatric staff, for the purpose of determining whether or not he is capable of standing trial, and participating in his own defense, and, whether or not Defendant was mentally competent at the time of the alleged offense or offenses.

It is further ORDERED that a copy of the psychiatric report be made available to Robert M. Coker, Public Defender, and to the District Attorney, Carole Wall.

This 22nd day of May, 1979.

CHARLES L. WELTNER
JUDGE, S.C., A.J.C.

FILED IN OFFICE

MAY 22 1979
Martha Nolan
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

BOOK 855 PAGE 530
MA

Grady Memorial Hospital

June 4, 1979

80 Butler Street, SE. Atlanta, Georgia 30303. Telephone 404 659-1212

J.W. Pinkston, Jr
Executive Director

Asa G. Yancey, M.D.
Medical Director

Weston D. Bergman, Jr
Assistant Director
Administrative Services

Thomas L. Collier
Assistant Administrator
Hughes Spalding Pavilion

T.E. Garner Jr
Assistant Director
Administrative Services

Frank K. Lawlong
Assistant Director
Professional Services

Robert L. Parrish, Jr
Assistant Director
Ambulatory Care

E.R. White
Assistant Director
Fiscal Affairs

Charles H. Wilson, Jr
Administrator
Hughes Spalding Pavilion

Mary F. Woody, R.N.
Assistant Director
Director of Nursing

To cal
6-25

The Honorable Charles L. Weltner, Judge
Fulton County Superior Court
Atlanta Judicial Circuit
136 Pryor Street, SW
Atlanta, Georgia 30303

Re: Mr. Donald Wayne Thomas

Dear Judge Weltner:

Mr. Donald Wayne Thomas, Indictment #A-44518, was evaluated on June 1, 1979 pursuant to a court order received on May 23, 1979. The following comments reflect a summary of the observations obtained during the course of the interview with Mr. Thomas. There was no additional history or background information available at the time of the evaluation.

PURPOSE OF EVALUATION: Mr. Thomas was informed that the evaluation had been requested by the court and that a summary of observations would be forwarded to the court for its potential use in the disposition of his case. In response to a question regarding his understanding of the charges against him, he stated "I turned myself in on an assault case and they came out here and said I killed a little white boy."

MENTAL STATUS EXAMINATION: Mr. Thomas presented as an alert, rather slender black male dressed in an institutional green jumpsuit, unkempt in his appearance and exhibiting poor personal hygiene. He sat rigidly in his chair staring past the examiner and demonstrated little spontaneity in response to questions. He stated that he had no idea of the month or the day and when asked the year he acknowledged his identity and stated that "I'm in the jail, big rock jail in Atlanta." His speech was characterized by tangential to loose associations, however, he denied experiencing delusional ideations and/or perceptual distortions in the form of either auditory of visual hallucinations. His affect was markedly flattened and his mood was depressed, without evidence of overt suicidal or homicidal ideation. As the interview progressed, and he was questioned more closely regarding his current mental status, he became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands. His objective judgment was determined to be significantly impaired as a result of his markedly inappropriate behavior. His insight was considered to be nil. As a result of his inability to respond to questioning, the clinical interview was terminated.

I was unable to elicit any substantial family or personal history as a result of his mental status, however the above noted observations are clearly indicative of a diagnosis of Schizophrenia. In the absence of history to the contrary, I must assume that this psychotic behavior is a manifestation of an acute process. Clinical recommendations would include the transfer of Mr. Thomas to an inpatient psychiatric facility in the interest of eliminating his psychotic symptoms. He was placed on Thorazine

FILED IN OFFICE
JUN 13 1979
Martha Nolan
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

50 mgs. twice a day at the close of the interview.

FORENSIC CONSIDERATIONS: Mr. Thomas appeared aware of the charges against him, however as a result of his psychotic state, he did not appear to appreciate his role in the proceedings pending before him nor was he able to communicate effectively with this examiner. It is my impression that Mr. Thomas, as a result of psychotic decompensation, is unable to actively participate in the legal proceedings against him and is so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense.

I am unable to offer an opinion regarding his mental status at the time of the alleged offenses, as his state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense.

Respectfully,

Lloyd T. Baccus, M.D.
Director, Inpatient Psychiatry
Psychiatry & Law Service

LTB:reb

cc: Ms. Carole E. Wall
Asst. District Attorney

Mr. Robert M. Coker
Public Defender

SHELDON B. COHEN, M. D.
804 PEACHTREE MEDICAL BUILDING
401 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30308

Telephone 525-6138

August 8, 1979

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Fulton County Courthouse
Atlanta, Georgia 30303

Re: Donald Wayne Thomas
Indictment No. A-44518

Dear Judge Weltner:

Pursuant to your order of 7 August 1979, Mr. Thomas, who is accused of murder, was seen in psychiatric consultation to determine his capacity to cooperate meaningfully with counsel and to stand trial.

Mr. Thomas was brought to my office ahead of time by two Sheriff's deputies. He sat quietly in the waiting room until I called him. He is a 19 year old, single, Negro male who apparently had been employed regularly as an unskilled laborer in a restaurant for several years.

I explained the purpose of the interview and asked him what he understood it to be and he said, "You are supposed to be a doctor and they say I am crazy, I reckon." However, he said he didn't think he was crazy. He said that he had been in jail for some time, having given himself up "for an assault case." He said that he knew he had done something wrong and he wanted to get it over with.

When asked for details of the assault charges, he said that it was over with, that it was in the past and he did not want to talk about it. When asked about murder charges, he stated that he had been in court on the assault charges and that someone telephoned the court saying that he had committed murder, that they went out and looked for the body and found it. He said the call must have been from someone who did not like him and that he did not have anything to do with this incident, that he had been in jail at the time. He continually denied knowing anything about the murder of a nine year old white boy and strongly implied that many of his difficulties were because his ex-girl friend, Linda Cook, was angry with him and would do anything to hurt him. He said this was because of urinary incontinence present for seven years and that she and others made fun of him because of this.

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AUG 10 1979
Martha Nelson
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

He was able to give me fundamental, historical information about his mother, four brothers and his work history.

During the interview he was at times angry, negativistic and provocative; for example, smoking a cigaret in the waiting room despite a sign on the door asking people to not smoke. He initially seemed to be pretending not to understand or comprehend anything that was asked of him; for example, when asked if he would like a Coca-Cola or coffee, he looked up and said, "What is that?" Later, as he began talking and became less defensive it was quite apparent that he was very much aware of such phenomenon and he asked if he could have a piece of candy which he noted in a jar in my office.

The interview conducted by Dr. Baccus in early June showed apparently quite different behavior, so that he seemed unresponsive to simple, every day questions. He apparently was placed on a tranquilizer (Thorazene 100 mgs. daily) and this may account for the difference in manner and behavior at this time. It is of course also possible that he may have simulated more in the previous interview than he did today.

At this time I cannot arrive at either a definitive diagnosis or answer the questions as to his mental capacity to assist in his own defense and to stand trial. There is conflicting information from the Grady interview and that which I obtained today. Consequently, I would recommend extended observation at Central State Hospital in order to clarify these factors.

Thanking you for asking me to see Mr. Thomas, I am

Sincerely,

Sheldon B. Cohen

Sheldon B. Cohen, M. D.

SBC:hcm
Encl.

FILED IN OPEN COURT, THIS THE
25 day of June 1979
Dana D. Jacobs
Deputy Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

THE STATE	X	CRIMINAL INDICTMENT
V.	X	NO. A-44518
DONALD WAYNE THOMAS	X	

SPECIAL PLEA OF INCOMPETENCY TO STAND TRIAL AND MOTION FOR TRANSFER OF DEFENDANT TO THE DEPARTMENT OF HUMAN RESOURCES

Now comes the Defendant above-named and files this his plea of incompetency to stand trial, and in support thereof shows the Court the following:

1.

On May 23 1979, the Honorable Charles Weltner, Judge, Fulton Superior Court, ordered that the Defendant be examined by psychiatric personnel at Grady Memorial Hospital to determine inter alia, whether or not he is competent to assist counsel in the preparation of his defense.

2.

On June 1, 1979, the Defendant was so examined and found not to be competent to assist in the preparation of his defense or thus to stand trial at this time. A copy of the report containing said finding is attached hereto as Exhibit "A".

3.

Under the provisions of Ga.L. 1977, pp. 1293, 1296, §27-1502, Ga. Code Ann., upon the filing of the within plea, it is the duty of the Court to try the issue of the Defendant's mental competency to stand trial before a special jury and if the jury finds him to be thus incompetent, to transfer the Defendant to the Department of Human Resources for evaluation and diagnosis as to the probability of his attaining mental competency to stand trial in the foreseeable future.

4.

The District Attorney having consented to the within plea as evidenced by his signature below, Defendant moves this Honorable Court to transfer him forthwith to the Department of Human Resources for the evaluation and diagnosis provided for in §27-1502, Ga. Code Ann.

WHEREFORE, Defendant respectfully prays this Court to accept this special plea and to order his transfer to the Department of Human Resources for the above-stated purposes.

Robert M. Coker

ROBERT M. COKER
Attorney for Defendant

Consented to by:

____

Assistant District Attorney
Fulton Superior Court
Atlanta Judicial Circuit

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

THE STATE	)	INDICTMENT NO. A-44518
VS.	)	
DONALD WAYNE THOMAS	)	**ORDER**

It appearing to the Court, upon psychiatric evaluation, that the Defendant may be presently incompetent to participate in his defense, it is

ORDERED that he be transferred by the Sheriff to the custody of the Department of Human Resources, as directed by the said Department of Human Resources, there to remain until return to the jurisdiction of this Court as provided by law.

This 10th day of August, 1979.

CHARLES L. WELTNER
JUDGE, S.C., A.J.C.

BY CONSENT OF
DISTRICT ATTORNEY AND
DEFENSE COUNSEL.

FILED IN OFFICE
AUG 10 1979
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

BOOK 875 PAGE 413

FORENSIC SERVICES DIVISION
CENTRAL STATE HOSPITAL
Milledgeville, Georgia 31062
GEORGIA DEPARTMENT OF HUMAN RESOURCES
(912) 453-4381

September 24, 1979

A 44518

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Courthouse
Atlanta, Georgia 30303

Re: Thomas, Donald Wayne
Case No. 228,112
Fulton County
Binion 2 South

Dear Judge Weltner:

Mr. Donald Wayne Thomas was admitted to the Forensic Services Division of Central State Hospital on August 27, 1979 by Order of your Court. We understand that he is charged with Murder. Your Order states that the defendant may be presently incompetent to participate in his defense and that because of conflicting reports from two other psychiatrists, further evaluation by the court is requested.

The physical examination was unremarkable. Neurological examination ncluding brain scan, skull series, electroencephalogram and neurological onsultation are all within normal limits. All routine laboratory procedures ere within normal limits. The chest x-ray was negative. Although Mr. Thomas as had vague urinary complaints, his urinalysis has been within normal limits.

On admission, Mr. Thomas was noted to be tense, anxious and nervous. His peech was logical, relevant, coherent and goal directed. However, he was somehat guarded and did not volunteer any information. His psychomotor activity as a little decreased and he spoke in a very low tone. His affect was somewhat lat. He was partially oriented. He denied hallucinations, delusions and uicidal thoughts. Psychological testing reveals he functions in the Borderline ange of intelligence. Personality testing suggests the presence of a thought isorder, which resembles that of a schizophrenic process. Based on our examination, evaluation, and information available to us, he has been given the diagnosis f Latent Schizophrenia. He gives no other history of psychiatric treatment.

Based on our examination and evaluation, we have concluded that he is aware f the charge pending against him and the possible consequences. He is able to elate to his attorney in the preparation of his defense. Therefore, we consider im competent to stand trial.

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atha Cole
TY CLERK SUPERIOR COURT
LTON COUNTY GEORGIA

As to his degree of criminal responsibility, it is our opinion that he is able to distinguish between right and wrong, and was not acting under the influence of a compulsive delusion which overmastered his will to resist committing the alleged offense.

Please send a duly authorized person for him at your earliest convenience.

Very truly yours,

Jose M. Delatorre, M.D.
Medical Director
Forensic Services Division

JMD:id

cc: Honorable Lewis R. Slaton (Enclosed)
Defense Counsel (Enclosed)

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA : INDICTMENT NO. A-44518
VS. : MURDER
DONALD WAYNE THOMAS : FULTON SUPERIOR COURT

MOTION TO STRIKE AND QUASH GEORGIA STATUTE PROVIDING FOR DEATH QUALIFICATION VOIR DIRE QUESTION

Now comes the defendant in the above-styled case and challenges as unconstitutional the application of Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)] to voir dire by the District Attorney of potential jurors in his trial. In support of his challenge, defendant states:

1.

He is charged with a capital offense and will be tried by a jury.

2.

In the course of voir dire of potential jurors, the District Attorney is expected to propound the question set forth in Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)], to wit:

> "Are you conscientiously opposed to capital punishment?"

3.

The District Attorney is further expected to challenge for cause under Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)] any potential juror who responds in the affirmative to said question.

FILED IN OPEN COURT, THIS THE
22 day of Oct ,, 79
Sara R Jacobs
Deputy Clerk

4.

The application of the "death qualification" voir dire question found at Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)] violates the defendant's right to an impartial jury drawn from a cross-section of the community under the Sixth and Fourteenth Amendments to the United States Constitution and under Ga. Code §59-106, in that it excludes from the jury an identifiable segment of the community opposed to the death penalty.

5.

The application of the "death qualification" voir dire question found at Georgia Laws 1853-54 [(Ga. Code §59-806(4)] results in a jury which is biased in favor of the prosecution and therefore violates defendant's right to an impartial trial under the Sixth and Fourteenth Amendments to the United States Constitution.

6.

Because a bifurcated trial is required in capital cases under Ga. Code §27-2503(b), application of the "death qualification" voir dire question found at Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)] to the potential jurors before the guilt or innocence phase of the trial allows a grave possibility of prejudice which cannot be justified by any State interest, and for which there is an easily accessible alternative.

7.

Application of the "death qualification" voir dire question found at Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)] violates defendant's right to equal protection under the law, since it arbitrarily singles out capital cases as cases in which the State is permitted to exclude potential jurors because of their views on punishment.

8.

If the Court restricts voir dire of the defense on the issues of punishment or questions of law but allows use by the State of the death qualification voir dire question found at Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)], thereby affording the State an advantage in jury selection, defendant will be deprived of his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

9.

The death qualification voir dire question found at Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)] does not meet the constitutional standards of specificity and clarity in determining the views of the potential juror toward the death penalty established in Witherspoon v. Illinois, 391 U.S. 511, 522-23 (1968); Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and Miller v. State, 224 Ga. 627, 634 (1968).

WHEREFORE, defendant prays that Georgia Laws 1853-54, p. 87 [(Ga. Code §59-806(4)] be quashed as unconstitutional and that it not be applied in the course of the State's voir dire of potential jurors of his trial.

Respectfully submitted,

Robert M. Coker

ROBERT M. COKER

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA : INDICTMENT NO. A-44518
VS. : MURDER
DONALD WAYNE THOMAS : FULTON SUPERIOR COURT

MOTION TO STRIKE AND QUASH AS UNCONSTITUTIONAL THE GEORGIA STATUTES PROVIDING FOR THE IMPOSITION OF THE DEATH PENALTY, AND THEIR APPLICATION TO THIS CASE

Now comes the defendant in the above-styled case and shows this Court the following:

1. That he is charged with MURDER;

2. That the State of Georgia acting by and through the district attorney for said judicial district in the above-styled matter has stated that in the event the defendant is found guilty, he will request that the death penalty be imposed.

3. In the event that defendant is found guilty, the state may rely on Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1))

4. That said statute should be quashed and held unconstitutional in that it violates the constitutional prohibition against the use of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and the rule of law espoused and mandated in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d. 346, 92 S.Ct. 2726 (1972).

5. Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1) is discretionary and is applied discriminatorily against certain classes of defendants in violation of the due process and equal protection clauses of Art. I, Sec. I, Pars. II and

IN OPEN COURT, THIS THE
y of Oct 1979

III of the Georgia Constitution (Ga. Code §§2-102, 2-103) and the Fourteenth Amendment to the United States Constitution.

6. The categories of aggravating circumstances in Georgia Laws 1973, pp. 159, 163 (Ga. Code §27-2534.1) are unreasonable and arbitrary in violation of the equal protection clause of Art. I, Sec. I, Par. II of the Georgia Constitution (Ga. Code §2-102), and of the Fourteenth Amendment to the United States Constitution.

7. Georgia Laws 1974, pp. 352, 353 (Ga. Code §27-2302) allows the jury subjective discretion in applying the death penalty in violation of Furman v. Georgia, supra, and of the Eighth and Fourteenth Amendments to the United States Constitution.

8. Georgia Laws 1973, pp. 159, 165 [Ga. Code §27-2537(f)], provides for the collection of data on sentences imposed in capital felony cases after January 1, 1970, for purposes of reviewing death sentences as excessive or disproportionate or arbitrary. This statutory check against arbitrary and discriminatory application of the death penalty is not being complied with, hereby depriving defendants sentenced to death of an effective or adequate review of their sentence in violation of due process of law.

WHEREFORE, defendant prays that he be allowed to present evidence in support of each and every allegation included in this original Motion and that this Court quash and hold unconstitutional the Georgia Laws allowing the imposition of the death penalty.

Respectfully submitted,

Robert M. Coker

ROBERT M. COKER
Attorney for Defendant

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the District Attorney with a copy of this motion

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA)
)
vs.) INDICTMENT NO. A-44518
)
DONALD WAYNE THOMAS)
)

TO: The Judge of Said Count and
the Attorney of Record for the Defendant.

NOTICE OF AGGRAVATING CIRCUMSTANCES

Pursuant to the provisions of the General Acts and Resolutions, Acts of 1973 Volume 1, Pages 164 and 165, Code Section designated by the Act as 27-2534.1 and other pertinent sections of said Act, the undersigned, as District Attorney, submits to the Court and said defendant that the State contends and expects to prove in said case that the defendant committed the aforesaid crime under the following aggravating circumstance, to-wit:

- 1 -

The offense of murder was outrageously ~~and~~ wantonly vile, horrible ~~and~~ inhuman, in that it involved torture and depravity of mind. Georgia Code Ann. § 27-2534.1(7).

This 22 day of October, 1979.

Carole E. Wall
CAROLE E. WALL
Assistant District Attorney
Atlanta Judicial Circuit

FILED IN OFFICE
OCT 22 1979
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

[COUNSEL'S OBJECTION REGARDING QUALIFICATION OF JURORS AND LACK OF OBJECTIVE STANDARD FOR DETERMINING AGGRAVATING CIRCUMSTANCES, AND COURT'S RULING:]

MR. COKER: Your Honor, I would once again renew my objection to qualification of jurors on the death penalty on the grounds that the death penalty would be in violation of the Eighth Amendment against cruel and unusual punishment.

I would further reraise my objection to the notice of statutory aggravating circumstances served upon me, and that is 27-2534.1 parenthesis 7, on the grounds that it's vague and has no objective standard to be applied in deciding whether that statutory aggravating circumstance exists.

Third, I would ask that the Court take sentencing away from the jury and impose a life sentence on Mr.Thomas, either yourself or by direction from you to the jury.

THE COURT: All right, anything further?

MR. COKER: No, sir.

THE COURT: All right, those objections will be overruled, and the Court will submit, as the statute requires, I believe, the question to the jury.

[INSTRUCTIONS PRIOR TO PENALTY PHASE OF TRIAL:]

THE COURT: Members of the jury, it is my duty as the Presiding Judge to instruct you now as to the law governing the sentencing phase of this case. The instructions given you earlier in this case and the rules of law outlined to you in this portion of the instructions apply also to your deliberations as to penalty.

The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance.

In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.

Such a circumstance is defined as a

statutory aggravated circumstance under the law of this state.

Members of the jury, you have found this defendant guilty of the offense of murder, and you may recommend one of two sentences as punishment, if you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances as contended by the State. If you do so find, you may recommend that this defendant be put to death by adding to your verdict, "We recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt," and you must set forth in writing the aggravated circumstances which you find to exist.

If you do add that recommendation, the accused will be sentenced to be put to death in the manner provided by law, which in this state is electrocution.

The other punishment which you may recommend in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this defendant should be put to death, you would return a verdict as follows:

"We recommend life." The effect of this sentence would be that the Court would sentence this accused to life imprisonment.

Now, members of the jury, you should consider all evidence submitted in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Members of the jury, even if you find beyond a reasonable doubt that the State has proved the existence of aggravating circumstances in this case, which would justify the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized, under these circumstances, to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion, and you may provide for a life sentence for this accused for any reason that is satisfactory to you, or without any reason, if you care to do so.

The law vests the exclusive right with the jury to either make or withhold a recommendation forthe death sentence.

Of course, if the State has failed to prove beyond a reasonable doubt that the offense was committed under the aggravated circumstances described to you, you are not authorized to recommend the death penalty. Without such a finding the death penalty cannot be imposed. In that event, your verdict would be, "We recommend life," the effect of which would be that the Court would sentence this defendant to life in prison.

The law requires that the Presiding Judge give to the jury certain instructions in writing and that the jury, if its verdict be a recommendation of death, shall designate in writing the aggravated circumstance or circumstances which it finds to exist beyond a reasonable doubt.

I will give you this written charge.

Now, Ladies and Gentlemen, in the event that you recommend the death penalty in this case, you must write out the recommendation of your findings as to any statutory aggravated circumstances in the form which I have given to you in these instructions.

Your verdict must be unanimous; that is, agreed to by all 12 of your members. It must be in writing, dated, and signed by your foreman.

You may retired to consider your verdict.

The alternates will kindly stand aside.

(Whereupon the jury retired to the jury room, at 4:20 p.m.)

THE COURT: Any exceptions?

MS. WALL: I have none, Your Honor.

MR. COKER: Your Honor, at this time, Your Honor, however, I would specifically reserve any objections.

THE COURT: I see. All right. Any exceptions are, of course, reserved.

Do you want to look at that?

MR. COKER: Okay.

(At 5:44 p.m. the following transpired.)

THE COURT: Now, for the record, it being about 5:45 p.m., I have this question. "May you advise us the soonest a person can be released if given a life sentence?" I propose to answer that as follows: "I am not permitted to answer this question. Signed."

[WRITTEN INSTRUCTIONS TO JURY]

Members of the jury, it is my duty as the Presiding Judge to instruct you now as to the law governing the sentencing phase of this case. The instructions given you earlier in this case and the rules of law outlined to you in this portion of the instructions apply also to your deliberations as to penalty.

The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as "statutory aggravating circumstance".

In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.

Such a circumstance is defined as a statutory aggravated circumstance under the law of this State.

Members of the jury, you have found this Defendant guilty of the offense of murder, and you may recommend one of two sentences as punishment, if you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances as contended by the State. If you do so find, you may recommend that this Defendant be put to death by adding to your verdict, "We recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt", and you must set forth in writing the aggravated circumstances which you find to exist.

Court Exhibit
10/24/79
aj

(Court Exhibit Number 2
Page 1 of 3.)

If you [illegible] that recommendation, [illegible] accused will be sentenced to be put to death in the manner provided by law, which in this State is electrocution.

The other punishment which you may recommend in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this Defendant should be put to death, you would return a verdict as follows: "We recommend life". The effect of this sentence would be that the Court would sentence this accused to life imprisonment.

Now, members of the jury, you should consider all evidence submitted in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Members of the jury, even if you find beyond a reasonable doubt that the State has proved the existence of aggravating circumstances in this case which would justify the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized under these circumstances to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion, and you may provide for a life sentence for this accused for any reason that is satisfactory to you, or without any reason, if you care to do so.

The law vests the exclusive right with the jury to either make or withhold a recommendation for the death sentence.

Of course, if the State has failed to prove beyond a reasonable doubt that the offense was committed under the aggravated

(Court Exhibit Number 2
Page 2 of 3.)

circumstances described to you, you are not authorized to recommend the death penalty. Without such a finding the death penalty cannot be imposed. In that event, your verdict would be "We recommend life"; the effect of which would be that the Court would sentence this Defendant to life in prison.

The law requires that the Presiding Judge give to the jury certain instructions in writing and that the jury, if its verdict be a recommendation of death, shall designate in writing, the aggravated circumstance or circumstances which it finds to exist beyond a reasonable doubt.

I will furnish to you a written copy of this portion of the charge and I charge you that in the event that you recommend death as a penalty in this case, you must write out the recommendations and your findings as to any statutory aggravated circumstance in the form which I have given you in these instructions.

Your verdict must be unanimous -- that is, agreed to by all twelve of your members. It must be in writing, dated, and signed by your Foreman.

You may retire and complete your verdict.

(Court Exhibit Number 2
Page 3 of 3.)

~~Can~~ May you advise me the soonest a person can be released if given a life sentence?

I AM NOT PERMITTED TO ANSWER THIS QUESTION.

RESPECTFULLY

(Court Exhibit Number 1)

Court Exhibit 10/29/79

We, the jury, reommend death and Find the following statutory aggravated circumstances beyond a reasonable doubt: that choking and strangling of a 9 year child causing axphyxiation by the defendant was outrageously + wantonly vile, horrible and inhuman in that it involved torture and depravity of mind,

ILED IN OPEN COURT, THIS THE
24 day of October 1979
Dora A. Jacobs
Deputy Clerk

Ed Branan
Foreman
10/24/79

eport of the Trial Judge

of the

Superior Court of FULTON County, Georgia

NOV-6 1979
DEPUTY CLERK SUPERIOR CO
FULTON COUNTY GEORG

The State vs. DONALD WAYNE THOMAS
(A case in which the death penalty was imposed)

A-4451

A. Data Concerning the Defendant

Name THOMAS (Last) DONALD (First) WAYNE (Middle) 2. Date of Birth 4 / 7 / 19 (Mo. / Day / Ye)

Social Security Number 252 04 7413

Sex M ☑ 5. Marital Status: Never Married ☑
F ☐ Married ☐
Divorced ☐
Spouse Deceased ☐

Children
(a) Number of children NONE
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

Father living: Yes ☑ No ☐ If deceased, give date of death UNKNOWN
Mother living: Yes ☑ No ☐ If deceased, give date of death
Number of children born to parents
Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 [✓ 9] 10 11 12 13 14 15 16
(Circle one) [college

Intelligence Level: (IQ below 70) Low ☐
(IQ 70 to 100) Medium ☐
(IQ above 100) High ☐
"BORDERLINE", PER PSYCHIATR REPORT

Psychiatric Evaluation Performed: Yes ☑ No ☐
If performed is defendant:
a. Able to distinguish right from wrong? ☐ ☐
b. Able to adhere to the right? ☐ ☐
c. Able to cooperate intelligently in his own defense? ☐ ☐
If examined, were character or behavior disorders found? Yes ☐ No ☐
(If answer is yes, please elaborate) SEE ATTACHED CORRESPONDENCE RELATIVE TO THREE SEPARATE EVALUATIONS.

What other pertinent psychiatric [and psychological] information was reveal NONE —

Prior work record of defendant:

Type Job	Pay	Dates Held	Reason for Terminati
a. KITCHEN HELPER		UNKNOWN	UNKNOWN
b.			
c.			
d.			
e.			

*A separate report must be submitted for each defendant sentenced to death.

Was the case tried with or without jury? With ☑ Without ☐

How did the defendant plead? Guilty ☐ Not guilty ☑

C. Offense Related Data

Capital Offense for Which Penalty Imposed:

a. Treason . . . . ☐
b. Murder . . . . ☑
c. Kidnapping for Ransom . . . . ☐
d. Kidnapping where Injury Results . . ☐
e. Aircraft Hijacking. . . . . ☐
f. Rape . . . . ☐
g. Armed Robbery . . . . ☐

Were other offenses tried in the same trial? yes ☐ no ☑

If other offenses were tried in the same trial list those offenses.

a. ________________________________

b. ________________________________

c. ________________________________

d. ________________________________

If tried with jury, did the jury recommend the death sentence?
Yes ☑ No ☐

Statutory aggravating circumstances found: Yes ☑ No ☐

Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	☐	☐
(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	☐	☐
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or	☐	☐
(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	☐	☐
c. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	☐	☐

d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value. ☐ ☐

e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty. ☐ ☐

f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person. ☐ ☐

g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. ☑ ☑

h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties. ☐ ☐

i. The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement. ☐ ☐

j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another. ☐ ☐

List nonstatutory aggravating circumstances indicated by the evidence, if any.

a. PRIOR CONVICTIONS OF APRIL 18, 1979, FOR
b. CHILD MOLESTATION (A-43412 FULTON COUNTY)
c. AGGRAVATED ASSAULT WITH INTENT TO RAPE
d. (A-44281 FULTON COUNTY) UPON PLEAS OF GUILT

Was there evidence of mitigating circumstances? Yes ☐ No ☑

If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity. ☐

b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. ☐

c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. ☐

d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. ☐

e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. ☐

f. The defendant acted under duress or under the domination of another person. ☐

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. ☐

h. The youth of the defendant at the time of the crime. ☑ (NO EVIDENCE EXCEPT APPEARANCE OF ACCUSE

i. Other. ☐
Please explain if (i) is checked
NONE

If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes ☑ No ☐

Does the defendant's physical or mental condition call for special consideration? Yes ☐ No ☑

Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes ☑ No ☐

Was the victim related by blood or marriage to defendant? Yes ☐ No ☑

If answer is yes, what was the relationship?

Was the victim an employer or employee of defendant?
No ☑
Employer ☐
Employee ☐

Was the victim acquainted with the defendant?
No ☐
Casual Acquaintance ☐
Friend ☐
UNCLEA

Was the victim local resident or transient in the community?
Resident ☑
Transient ☐

Was the victim the same race as defendant? Yes ☐ No ☑

Was the victim the same sex as the defendant? Yes ☑ No ☐

Was the victim held hostage during the crime?
No ☐ UNKNOW
Yes - Less than an hour ☐
Yes - More than an hour ☐

Was the victim's reputation in the community:
Good ☐
Bad ☐
Unknown ☑

Was the victim physically harmed or tortured? Yes ☑ No ☐
If yes, state extent of harm or torture:
LACERATION TO HEAD; STRANGULATION MARKS ON NECK (CAUSA MORTIS)

What was the age of the victim? 41- TWINS 06

If a weapon was used in commission of the crime was it?
No weapon used ☑
Poison ☐
Motor Vehicle ☐
Blunt Instrument ☐
Sharp Instrument ☐
Firearm ☐
Other ________ ☐

Does the defendant have a record of prior convictions? Yes ☑ No ☐

If answer is yes, list the offenses, the dates of the offenses and the sentences imposed?

Offense	Date of Offense	Sentence Imposed
a. CHILD MOLESTATION	12/31/78	YOUTHFUL OFFENDER
b. AGGRAVATED ASSAULT	4/6/79	~~AGG. ASSLT~~
c. WITH INTENT TO RAPE		YOUTHFUL OFFENDER
d. (SENTENCED ON 4/18/79, TO RUN CONCURRENTLY)		

Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes ☐ No ☑

Was the defendant a local resident or transient in the community?
Resident ☑
Transient ☐

D. Representation of Defendant *

Date counsel secured MAY 14, 1979

How was counsel secured?
a. Retained by defendant ☐
b. Appointed by Court ☑

If counsel was appointed by court was it because
a. Defendant unable to afford counsel? ☑
b. Defendant refused to secure counsel? ☐
c. Other (explain) ________

How many years has counsel practiced law?
a. 0 to 5 ☐
b. 5 to 10 ☑
c. over ten ☐

What is the nature of counsel's practice? (PUBLIC DEFENDER)
a. Mostly civil ☐
b. General ☐
c. Mostly criminal ☑

Did the same counsel serve throughout the trial? Yes ☑ No ☐

If not, explain in detail ________

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

Was race raised by the defense as an issue in the trial? Yes ☐ No ☑

Did race otherwise appear as an issue in the trial? Yes ☑ No ☐

What percentage of the population of your county is the same race as the defendant?

- a. Under 10% . . . . ☐
- b. 10 to 25% . . . . ☐
- c. 25 to 50% . . . . ☑
- d. 50 to 75% . . . . ☐
- e. 75 to 90% . . . . ☐
- f. Over 90% . . . . ☐

Were members of defendant's race represented on the jury? Yes ☑ No ☐

If not, was there any evidence they were systematically excluded from the jury? Yes ☐ No ☑

Was the jury instructed to exclude race as an issue? Yes ☐ No ☑

Was there extensive publicity in the community concerning this case? Yes ☑ No ☐

Was the jury instructed to disregard such publicity? Yes ☐ No ☑
(SEQUESTERED ENTIRE TIME)

Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ☐ No ☑

Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes ☐ No ☑

If answer is yes, what was that evidence? ________________________________

In your opinion, was the death sentence imposed in this case appropriate? Yes ☑ No ☐

General comments concerning your answer: UNEXPLAINED STRANGULATION OF 9-YEAR OLD CHILD; BRUTALITY TO CHILD'S CORPSE.

F. Chronology of Case

		Elapsed Days
Date of Offense	APRIL 19, 1979 (PER INDICTMENT; PROBABLY 4/11/79)	
Date of Arrest	APRIL 20, 1979	1
Date Trial Began	OCTOBER 22, 1979	155
Date Sentence Imposed	OCTOBER 24, 1979	2

(RESERVED)

Date post trial motions ruled on ______________

Date Trial Judge's Report Completed ______________

*Date received by Supreme Court ______________

*Date sentence review completed ______________

*Total elapsed days ______________

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached (✓)
2. He stated he had no comments ( )
3. He has not responded ( )

Nov 5, 1977

Date

Judge, Superior Court of

FULTON County

Grady Memorial Hospital

80 Butler Street. SE. Atlanta, Georgia 30303. Telephone 404 659-1212

J.W. Pinkston Jr
Executive Director

Asa G. Yancey M.D
Medical Director

Weston D. Bergman Jr
Assistant Director
Administrative Services

Thomas L. Collier
Assistant Administrator
Hughes Spalding Pavilion

T.E. Garner Jr
Assistant Director
Administrative Services

Frank K. Lawford
Assistant Director
Professional Services

Robert L. Parrish Jr
Assistant Director
Ambulatory Care

E.R. White
Assistant Director
Fiscal Affairs

Charles H. Wilson, Jr
Administrator
Hughes Spalding Pavilion

Mary F. Woody, R.N.
Assistant Director
Director of Nursing

June 4, 1979

To cal
6-25

The Honorable Charles L. Weltner, Judge
Fulton County Superior Court
Atlanta Judicial Circuit
136 Pryor Street, SW
Atlanta, Georgia 30303

Re: Mr. Donald Wayne Thomas

Dear Judge Weltner:

Mr. Donald Wayne Thomas, Indictment #A-44518, was evaluated on June 1, 1979 pursuant to a court order received on May 23, 1979. The following comments reflect a summary of the observations obtained during the course of the interview with Mr. Thomas. There was no additional history or background information available at the time of the evaluation.

PURPOSE OF EVALUATION: Mr. Thomas was informed that the evaluation had been requested by the court and that a summary of observations would be forwarded to the court for its potential use in the disposition of his case. In response to a question regarding his understanding of the charges against him, he stated "I turned myself in on an assault case and they came out here and said I killed a little white boy."

MENTAL STATUS EXAMINATION: Mr. Thomas presented as an alert, rather slender black male dressed in an institutional green jumpsuit, unkempt in his appearance and exhibiting poor personal hygiene. He sat rigidly in his chair staring past the examiner and demonstrated little spontaneity in response to questions. He stated that he had no idea of the month or the day and when asked the year he acknowledged his identity and stated that "I'm in the jail, big rock jail in Atlanta." His speech was characterized by tangential to loose associations, however, he denied experiencing delusional ideations and/or perceptual distortions in the form of either auditory of visual hallucinations. His affect was markedly flattened and his mood was depressed, without evidence of overt suicidal or homicidal ideation. As the interview progressed, and he was questioned more closely regarding his current mental status, he became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands. His objective judgment was determine to be significantly impaired as a result of his markedly inappropriate behavior. His insight was considered to be nil. As a result of his inability to respond to questioning, the clinical interview was terminate

I was unable to elicit any substantial family or personal history as a result of his mental status, however the above noted observations are clearly indicative of a diagnosis of Schizophrenia. In the absence of history to the contrary, I must assume that this psychotic behavior is a manifestation of an acute process. Clinical recommendations would includ the transfer of Mr. Thomas to an inpatient psychiatric facility in the interest of eliminating his psychotic symptoms. He was placed on Thorazi

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ULTON COUNTY GEORGIA

BOOK 895 PAGE 848 m BOOK 661 PAGE 330

50 mgs. twice a day at the close of the interview.

FORENSIC CONSIDERATIONS: Mr. Thomas appeared aware of the charges against him, however as a result of his psychotic state, he did not appear to appreciate his role in the proceedings pending before him nor was he able to communicate effectively with this examiner. It is my impression that Mr. Thomas, as a result of psychotic decompensation, is unable to actively participate in the legal proceedings against him and is so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense.

I am unable to offer an opinion regarding his mental status at the time of the alleged offenses, as his state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense.

Respectfully,

Lloyd T. Baccus, M.D.
Director, Inpatient Psychiatry
Psychiatry & Law Service

LTB:reb

cc: Ms. Carole E. Wall
Asst. District Attorney

Mr. Robert M. Coker
Public Defender

SHELDON B. COHEN, M. D.
804 PEACHTREE MEDICAL BUILDING
401 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30308
Telephone 525-6138

August 8, 1979

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Fulton County Courthouse
Atlanta, Georgia 30303

Re: Donald Wayne Thomas
Indictment No. A-44518

Dear Judge Weltner:

Pursuant to your order of 7 August 1979, Mr. Thomas, who is accused of murder, was seen in psychiatric consultation to determine his capacity to cooperate meaningfully with counsel and to stand trial.

Mr. Thomas was brought to my office ahead of time by two Sheriff's deputies. He sat quietly in the waiting room until I called him. He is a 19 year old, single, Negro male who apparently had been employed regularly as an unskilled laborer in a restaurant for several years.

I explained the purpose of the interview and asked him what he understood it to be and he said, "You are supposed to be a doctor and they say I am crazy, I reckon." However, he said he didn't think he was crazy. He said that he had been in jail for some time, having given himself up "for an assault case." He said that he knew he had done something wrong and he wanted to get it over with.

When asked for details of the assault charges, he said that it was over with, that it was in the past and he did not want to talk about it. When asked about murder charges, he stated that he had been in court on the assault charges and that someone telephoned the court saying that he had committed murder, that they went out and looked for the body and found it. He said the call must have been from someone who did not like him and that he did not have anything to do with this incident, that he had been in jail at the time. He continually denied knowing anything about the murder of a nine year old white boy and strongly implied that many of his difficulties were because his ex-girl friend, Linda Cook, was angry with him and would do anything to hurt him. He said this was because of urinary incontinence present for seven years and that she and others made fun of him because of this.

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AUG 1 0 1979
Martha Nolan
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

He was able to give me fundamental, historical information about his mother, four brothers and his work history.

During the interview he was at times angry, negativistic and provocative; for example, smoking a cigaret in the waiting room despite a sign on the door asking people to not smoke. He initially seemed to be pretending not to understand or comprehend anything that was asked of him; for example, when asked if he would like a Coca-Cola or coffee, he looked up and said, "What is that?" Later, as he began talking and became less defensive it was quite apparent that he was very much aware of such phenomenon and he asked if he could have a piece of candy which he noted in a jar in my office.

The interview conducted by Dr. Baccus in early June showed apparentl quite different behavior, so that he seemed unresponsive to simple, every day questions. He apparently was placed on a tranquilizer (Thorazene 100 mgs. daily) and this may account for the difference in manner and behavior at this time. It is of course also possible that he may have simulated more in the previous interview than he did today.

At this time I cannot arrive at either a definitive diagnosis or answer the questions as to his mental capacity to assist in his own defense and to stand trial. There is conflicting information from the Grady interview and that which I obtained today. Consequently, I would recommend extended observation at Central State Hospital in order to clarify these factors.

Thanking you for asking me to see Mr. Thomas, I am

Sincerely,

Sheldon B. Cohen

Sheldon B. Cohen, M. D.

SBC:hcm
Encl.

FORENSIC SERVICES DIVISION
CENTRAL STATE HOSPITAL
Milledgeville, Georgia 31062

September 24, 1979

A 4451

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Courthouse
Atlanta, Georgia 30303

Re: Thomas, Donald Wayne
Case No. 228,112
Fulton County
Binion 2 South

Dear Judge Weltner:

Mr. Donald Wayne Thomas was admitted to the Forensic Services Division of Central State Hospital on August 27, 1979 by Order of your Court. We understand that he is charged with Murder. Your Order states that the defendant may be presently incompetent to participate in his defense and that because of conflicting reports from two other psychiatrists, further evaluation by the court is requested.

The physical examination was unremarkable. Neurological examination including brain scan, skull series, electroencephalogram and neurological consultation are all within normal limits. All routine laboratory procedures were within normal limits. The chest x-ray was negative. Although Mr. Thomas has had vague urinary complaints, his urinalysis has been within normal limits.

On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process. Based on our examination, evaluation, and information available to us, he has been given the diagnosis of Latent Schizophrenia. He gives no other history of psychiatric treatment.

Based on our examination and evaluation, we have concluded that he is aware of the charge pending against him and the possible consequences. He is able to relate to his attorney in the preparation of his defense. Therefore, we consider him competent to stand trial.

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SEP 27 1979
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

Judge Weltner
Page Two
September 24, 1979

As to his degree of criminal responsibility, it is our opinion that he is able to distinguish between right and wrong, and was not acting under the influence of a compulsive delusion which overmastered his will to resist committing the alleged offense.

Please send a duly authorized person for him at your earliest convenience.

Very truly yours,

Jose M. Delatorre, M.D.
Medical Director
Forensic Services Division

JMD:id

cc: Honorable Lewis R. Slaton (Enclosed)
Defense Counsel (Enclosed)

STATE OF GEORGIA	I	INDICTMENT NO. A-44518
V.	I	MURDER
DONALD WAYNE THOMAS	I	FULTON SUPERIOR COURT

DEFENSE COUNSEL'S COMMENTS TO POST-SENTENCING REPORT OF TRIAL JUDGE

1. Item F-4 (page 6):

The sentence was imposed on October 24, 1979, rather than October 23, 1979.

2. Items C-11, E-12:

Defense Counsel feels that the evidence fails to foreclose all doubt as to Defendant's guilt and further, that imposition of the death penalty was inappropriate.

The evidence against Defendant was entirely circumstantial. The two witnesses whose testimony was essential in connecting Defendant with the alleged crime were shown to have personal interests in testifying for the State and against Defendant.

Linda Cook, Defendant's girl friend, was charged with Concealing Death (Ga. Code Ann. §26-1104), but was never prosecuted in Juvenile, State, or Superior Court, and was in fact, granted immunity from prosecution on October 23, 1979. This fact was made a part of the record herein through her attorney's statement, agreed to by the Assistant District Attorne and through Linda Cook's testimony on cross-examination. Furthe more, the record will reflect that Linda Cook was held in detention in the Fulton County Juvenile Court from April 19 or 20, 1979, until October 12, 1979, when she was released on a Writ of Habeas Corpus. One condition of her release was that she maintain daily contact with the District Attorney's Office. On cross-examination, she stated that she thought she would be returned to Juvenile detention if she did not maintain such daily contact.

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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

Additionally, Linda Cook's testimony differed in many respects between direct and cross-examination at trial, between her testimony at trial and her testimony at Defendant's preliminary hearing, between her testimony under oath at both proceedings and the written statement she made to police, and between her statement and testimony and the trial testimony of at least two police officers.

The other witness whose testimony was essential to the State's case was Enzor Lowe, Defendant's stepfather. Mr. Lowe was arrested on a Material Witness warrant at 2:00 a.m., Thursday October 18, 1979, and kept at the Fulton County Jail until after his testimony. His trial testimony was equivocal and only after he reviewed his statement to police three times did his testimony agree with his statement. Furthermore, Mr. Lowe admitted on cross-examination that he had been drinking when he made his statement to police.

For the foregoing reasons, Counsel submits that some doubt must remain as to Defendant's guilt and that imposition of the death penalty was not justified.

Respectfully submitted,

Robert M. Coker

ROBERT M. COKER
Attorney for Defendant

707 Title Building
30 Pryor St., SW
Atlanta, Georgia 30303
572-3286

VS.	:	NO. ; 518
DONALD WAYNE THOMAS	:	FULTON SUPERIOR COURT
	:	INDICTMENT AND CONVICTION FOR:

WHEREAS THE JURY in the above stated case returned the following verdict: " We, the jury, recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt; that choking and strangling of a 9 year child causing axphyxiation by the defendant was outrageously & wantonly vile, horrible and inhuman in that it involved torture and depravity of mind.

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, DONALD WAYNE THOMAS, be taken from the bar of this Court to the common jail of Fulton County, there to be safely kept until his removal to the Georgia State Prison in Tatnall County for the purpose of the execution of this sentence in the manner prescribed by law.

IT IS FURTHER ORDERED AND ADJUDGED BY the Court that the Sheriff of Fulton County, or his lawful deputy, together with such deputies as he may deem necessary (the number of guards to be approved by the Presiding Judge, or the Ordinary of said County) shall convey the said DONALD WAYNE THOMAS, to the Georgia State Prison in Tatnall County not more than twenty days and not less than two days prior to the 1st day of December 19 79, and there deliver him to the Director of Corrections to be electrocuted as provided by law, at such Penal Institution as may be designated by said Board.

AND IT IS ORDERED AND ADJUDGED by the Court that the Warden of the penitentiary of the State of Georgia shall execute the said DONALD WAYNE THOMAS, by electrocution, as provided herein and by law, in private, witnessed only by his counsel, relatives; and such clergymen and friends as he may so desire, within the walls of said institution, on the 1st day of December, 19 79, between the hours of 10:00 o'clock A.M., and 2:00 o'clock P.M.

AND MAY GOD HAVE MERCY ON his SOUL.

This the 24th day of October, 19 79

NPT. OCTOBER 25, 1979

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OCT 25 1979
Martha [illegible]
PUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

District Attorney
Atlanta Judicial Circuit

JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

(ENTERED ON OCT 25, 1979 TO CORRECT ERRONEOUSLY DATED

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

THE STATE : CASE NO. A-44518

vs. :

DONALD WAYNE THOMAS : MOTION FOR NEW TRIAL

Comes now DONALD WAYNE THOMAS, Defendant in the above-styled case, and moves the Court to set aside the verdict entered in the above-styled case on October 24, 1979 and the judgment and sentence entered on October 25, 1979 and grant him a new trial for any or all of the following reasons:

1.

The verdict, judgment and sentence are contrary to law.

2.

The verdict, judgment and sentence are contrary to the evidence.

3.

The verdict, judgment and sentence are contrary to the weight of the evidence.

4.

The Court erred by excusing for cause prospective jurors who were opposed to the death penalty.

5.

There was not sufficient aggravating circumstances to justify imposing a sentence of death.

WHEREFORE, defendant prays that the Court set aside the verdict, judgment and sentence in the above styled case and grant defendant a new trial.

Jack Dorsey, Atty. for defendant

Suite 540
148 International Blvd., N.E.
Atlanta, Ga. 30303
588-0241

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NOV 23 1979

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

THE STATE	)	INDICTMENT NO. A-44518
VS.	)	
DONALD WAYNE THOMAS	)	O R D E R

The Motion for New Trial is overruled on all grounds.

This 14th day of January, 1980.

CHARLES L. WELTNER
JUDGE, S.C., A.J.C.

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JAN 14 1980
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GEORGIA

[Death-qualifying voir dire of Ms. Frances Ogletree:]

[THE COURT:]Give your name, please, ma'am.

THE JUROR: Frances Ogletree.

THE COURT: Mrs.Ogletree, the Court inquires, are you conscientiously opposed to capital punishment?

THE JUROR: Yes.

THE COURT: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might develop in the trial of this case if you were selected as a juror?

THE JUROR: I believe I would go on the evidence.

THE COURT: Well, the question is, would you automatically vote against capital punishment without regard to any evidence that might be developed at the trial of the case?

THE JUROR: No. No.

THE COURT: Would your attitude toward the death penalty prevent you from making any impartial decision as to the defendant's guilt, again assuming that you are selected as a juror?

THE JUROR: I don't quite understand that, Judge Weltner.

THE COURT: Well, you said that you were opposed to capital punishment.

THE JUROR: Right.

THE COURT: I am asking you whether that feeling on your part would prevent you from making an impartial decision as to the question of guilt or innocence?

THE JUROR: I'm afraid it would.

THE COURT: All right.

MS. WALL: Your Honor, I move that she be excused for cause.

THE COURT: Mr. Coker?

MR. COKER: I object, on the grounds previously stated.

THE COURT: All right, ma'am, you may be excused. Please check back on the fourth floor and see if they need you any more.

[Death-qualifying voir dire of Joyce Beachum:]

THE CLERK: Mrs. Joyce Beachum.

THE COURT: Mrs.Beachum, the Court inquires of you as follows. Are you conscientiously opposed to capital punishment?

THE JUROR: Opposed? I don't know.

THE COURT: Ma'am --

THE JUROR: I never thought about it.

THE COURT: Let me ask you this question. Would you automatically vote against the imposition of a death sentence without regard to any evidence that might be developed in the trial of the case, if you were a juror in a case?

THE JUROR: No.

THE COURT: Would your attitude toward the death penalty prevent you from making any impartial decision as to the question of guilt or innocence?

THE JUROR: No.

BY MS. WALL:

Q Mrs. Beachum, you say you have never considered capital punishment?

A No. You read about it, you think about it, but unless it affects you, you know, you never just really, you know, think about it real deep.

Q All right, ma'am. Could you consider a case so horrible that you would write out a death sentence on a person, if you were the foreman of a jury?

A Could I do what now?

Q Could you consider the circumstances, the circumstances of the murder were such, that if you were foreman of the jury you could write out, we the jury sentence the defendant to death?

A No.

Q You could not write out the death sentence?

A I don't think so.

Q Ma'am, are there any circumstances so horrible that you could consider the death sentence?

THE COURT: Excuse me, consider writing it out.

BY MS. WALL:

Q Consider imposing it?

A Imposing it. Well, I guess I could consider imposing it. You mean, help carrying it out, right?

Q No. I mean, can you vote for the death sentence? Could you go in that jury room and vote for the death sentence?

A Oh, no.

MS. WALL: Your Honor, I'd ask that she be excused for cause.

THE COURT: You want to inquire further?

MR. COKER: Yes, Your Honor.

BY MR. COKER:

Q Mrs. Beachum, are you employed outside the home?

A Yes.

Q In what capacity?

A I am a resident manager for Paradise Apartments.

Q And where is that located?

A Well, the base office is on 504 Fifth Street, but I work on Hollywood Road.

Q Now, are you conscientiously opposed to capital punishment?

A Opposed to it?

Q Right.

A Okay. You are saying am I against capital punishment?

Q Right.

A Yes, I am against it.

MR. COKER: Your Honor, I request the Court to reiterate the second and third qualifying questions on that, before making a ruling on whether she should be struck for cause.

THE COURT: Now, Madam Juror, listen very carefully to these questions here. If there is anything about the question you don't understand, you ask me. We have got all day to answer the questions, so don't get nervous or feel like anybody is rushing you. What I have got to know under the law is this. Regardless of what the evidence might be in a case, is your feeling about capital punishment such that you would automatically vote against the death sentence, no matter what the evidence might be?

THE JUROR: Okay, I don't like the death sentence, and I just feel that there could be another way of doing things, so --

THE COURT: Now, answer my question. Notwithstanding that --

THE JUROR: All right.

THE COURT: -- and regardless of what the evidence in the case might be, is your view of the death penalty such that under no circumstances would you ever vote to impose the death penalty?

THE JUROR: No.

THE COURT: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?

THE JUROR: Yes.

THE COURT: And we are talking about voting to send someone to the electric chair to be electrocuted.

THE JUROR: Mmh-hmm.

THE COURT: Now, ma'am, answer this question. Is your attitude toward the death penalty as you have expressed it today, is that such as would prevent you from making an impartial decision as to the question of whether or not the defendant is guilty or innocent, independent of punishment?

THE JUROR: I think I could make a fair judgment.

THE COURT: About guilt or innocence?

THE JUROR: About guilt or innocence.

THE COURT: All right, Ms. Wall.

MS. WALL: Your Honor, I'd ask that she be excused for cause.

MR. COKER: I object to that, Your Honor.

MS. WALL: She has stated, based upon my question, that she could not go in there and vote for the death penalty. That is what she told me in her answer.

THE COURT: Well, let me inquire further. Now, you recall the question Ms. Wall is talking about. Do you want to comment on that? Either your mind is such that there are cases where you could vote for the death penalty, or there is no possible case where you could vote for the death penalty, and the Court has got to know which one of those is yours.

THE JUROR: Okay. Now, if we find the person -- if all evidence show that he was guilty, then I could render a judgment on that.

THE COURT: On whether the defendant is guilty?

THE JUROR: Yes.

THE COURT: Now, assume that you find the defendant guilty, would you be able, in any case, to vote for the imposition of a penalty of execution; that is, to impose the death penalty?

THE JUROR: Well, I guess if that's the alternative, yeah, if that's the last thing that's left.

THE COURT: You would be able to vote for a death penalty?

THE JUROR: If that's the only thing, if this is what you are asking.

THE COURT: I am asking you, ma'am, whether or not --

THE JUROR: Yes.

THE COURT: Whether or not there is any case, notwithstanding the fact that you don't like the death penalty, you think there is other means, is there any case that you can conceive that you would vote to send somebody to the electric chair to be executed?

THE JUROR: No.

THE COURT: All right, what do you say?

MS. WALL: I ask that she be excused for cause.

THE COURT: What do you say, Mr. Coker?

MR. COKER: I object to any excuse for cause.

THE COURT: Would you be good enough to wait in there just a minute, please.

(Whereupon the juror left the courtroom.)

THE COURT: Do you want to argue that, or just note your objection?

MR. COKER: Your Honor, she has --

THE COURT: I know what she has done. She has said three or four different things, but the last time she said she could not.

MR. COKER: Judge, in view of her other ambivalent answers, and the fact that it has taken a great deal of the Court's time to ask these questions, I would object to any excuse for cause with this prospective juror. She has not categorically said that she will not impose the death penalty.

THE COURT: That is what she justsaid, Mr. Coker. That is as categoric as you can get. That is not what she said before, I agree.

MS. WALL: I ask to strike her for cause.

THE COURT: Well, I think, as a matter of fact I will strike her for cause,and I will have to do that as I understand the law. I agree with you that she is quite ambiguous about it, but when it comes down to talking about sending somebody to the electric chair to be executed her ambiguity seems to fade away. I will have to grant the motion of the State.

All right, ask the lady to come in here, please, sir.

(Whereupon the juror returned to the stand.)

THE COURT: Okay, Mrs. Beachum, the Court is going to excuse you. Thank you very much. Please check back on the fourth floor, see if they need you.

All right, Mr. Sheriff.

[Death-qualifying voir dire of Eddie Watkins:]

THE CLERK: Eddie M. Watkins.

THE COURT: Mr. Watkins, the Court asks you as follows. Are you conscientiously opposed to capital punishment?

THE JUROR: Yes.

THE COURT: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of this case, if you were selected as a juror?

THE JUROR: No, I wouldn't automatically vote against it, no.

THE COURT: The Court inquires as follows. Can youconceive of a case wherein you would vote to impose capital punishment; that is, to vote to have a defendant convicted of murder, sent to the electric chair for electrocution?

THE JUROR: If the Court, you know -- no, I couldn't. No, I wouldn't do that. No, I would not.

THE COURT: All right. Would your attitude toward the death penalty prevent you from making an impartial decision as to the defendant's guilt; that is, on the question of guilt or innocence. Again, if you were selected to serve in this case.

THE JUROR: No, it would not.

THE COURT: You want to inquire?

MR. COKER: Your Honor, I'd like a clarification of your next to last question. The answer thereto.

THE COURT: I believe he said no, he could not do that. I interpret that to mean there is no case wherein he could conceive he would willingly vote to impose the death sentence. Now, if I'm incorrect --

THE JUROR: I thought you said capital punishment.

THE COURT: That is sending somebody to Reidsville to the electric chair to be executed.

THE JUROR: No, I wouldn't vote that way.

MS. WALL: Your Honor, I move he be excused for cause.

MR. COKER: Your Honor, I object for the same reason.

THE COURT: All right, you may be excused.

I think we had better explain to this jury the question that I am going to ask each of them, so that they can be thinking about that, and don't get hit, maybe, cold.

All right, we will take the next 12 and

do whatever general voir dire either of you wish to do, after putting them in the box.

[Death-qualifying voir dire of Ms. Christine Reese:]

THE CLERK: Ms. Christine Reese.

THE COURT: All right, let me ask you, ma'am, are you conscientiously opposed to capital punishment?

THE JUROR: Yes, I am.

THE COURT: Does that mean that under no circumstances would you consider voting for a death penalty?

THE JUROR: Well, I would have to hear the facts.

THE COURT: What I am asking you is this. Is your opposition to capital punishment such that there would be no case in which you would vote for capital punishment?

THE JUROR: No.

THE COURT: You want to inquire further?

MR. COKER: Judge, I'm not sure I understood her answer.

THE COURT: I think it was, no, there is not. Is that your last answer, ma'am?

THE JUROR: If I understood you to say

are there any circumstances, I would just say no to it.

THE COURT: All right. I want to ask you this. I want to ask you, if your view on capital punishment is so strong that under no circumstances, that you could conceive, would you ever consider voting for the death penalty if you were a juror? That is the question.

THE JUROR: No, my views are not that strong.

THE COURT: Well, is it such that, such that you might, under some evidence in the case, vote for the death penalty?

THE JUROR: Under extreme cases, extreme, but I don't believe in corporal punishment.

THE COURT: Well, in an extreme case, as you might view that word, would you be willing to consider voting for the death penalty, in an extreme case?

THE JUROR: I don't think I could. I don't think I could.

THE COURT: Would your view on capital punishment prevent you from making an impartial verdict on the question of whether or not the defendant is guilty or innocent?

THE JUROR: No.

THE COURT: It would not?

THE JUROR: No, sir.

BY MS. WALL:

Q Mrs. Reese, is there any case where you yourself could go into a jury room and vote to sentence someone to the electric chair at Reidsville.

A No, ma'am.

MS. WALL: Your Honor, I ask that she be excused for cause.

THE COURT: You want to inquire further, Mr. Coker?

MR. COKER: Your Honor, at this time. I would just object.

THE COURT: Okay. Mrs. Reese, now, you can be excused. Please go back down to the fourth floor and tell them you are available for further service.

THE JUROR: All right.

THE COURT: Thank you, ma'am.

[Death-qualifying voir dire of Evelyn Thompson:]

THE CLERK: Mrs. Evelyn Thompson.

THE COURT: Mrs. Thompson, I inquire of you as follows. Are you conscientiously opposed to capital punishment?

THE JUROR: Well, I don't really know that much about it. I mean -- you mean -- explain that one more time, about capital punishment, please, sir.

THE COURT: Capital punishment means electrocution in the electric chair, imposition of the death sentence. Are you conscientiously opposed?

THE JUROR: Yes, I am.

THE COURT: Now, let me ask you this.

Would you automatically vote against the imposition of the death sentence without regard to any evidence that might be developed on the trial of the case?

THE JUROR: No.

THE COURT: Now, would your attitude toward the death penalty prevent you from making an impartial decision as to the question of guilt or innocence?

THE JUROR: I really don't know, at this point.

THE COURT: Well, let me explain to you that under the procedure of the State, in a case where the death penalty is sought, the jury first determines whether or not a defendant is guilty or innocent without considering the question of punishment. Only, of course, if the defendant is found guilty would the question of punishment be considered. Now, I am asking you, would your attitude on capital punishment render you unable to make an impartial decision as to the question of guilt or innocence?

THE JUROR: I'm afraid it would.

MS. WALL: Your Honor, I'd ask that she

be excused for cause.

MR. COKER: I object on the grounds previously stated in Court.

THE COURT: All right, Mrs. Thompson, we will excuse you. You need to be back at 9:20 with the other jurors. You will not have any further responsibility in this case.

THE JUROR: Okay, thank you.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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NO. 80-5266

ORIGINAL COPY

DONALD WAYNE THOMAS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Was the trial court constitutionally required to provide the Petitioner with an evidentiary hearing on the issue of competency to stand trial under the circumstances of the instant case?

2.

Does the Petitioner's death sentence violate the constitutional principles set forth in the case of Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759 (1980)?

3.

Was the jury properly selected under the principles contained in the case of Witherspoon v. Illinois, 391 U.S. 511 (1968)?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5266

DONALD WAYNE THOMAS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the Petition for Writ of Certiorari, which seeks review of the decision of the Supreme Court of Georgia in this case. That decision is recorded as Thomas v. State, __ Ga. __,(1980), No. 36046, decided April 23, 1980, and has been attached as an appendix to the petition.

II.

STATEMENT OF THE CASE

Donald Wayne Thomas, Petitioner, was indicted in Fulton County in May, 1979, for the murder of Dewey Baugus. (R. 1-2). Following the first psychiatric examination, Petitioner was found on June 1, 1979 not competent to stand trial. (R. 8-11). However, after a later examination, Dr. Jose M. Delatorre of Central State Hospital infomed the Court on September 24, 1979, that Petitioner was able to distinguish right from wrong, and had not been acting under the influence of a compulsive delusion and was competent to stand trial. (R. 16-17). Following a jury trial, Petitioner was found guilty and was sentenced to the death penalty. (R. 119-120).

On April 19, 1979, the partially decomposed body of nine-year-old Dewey Baugus was found in the bushes near some railroad tracks in Atlanta. (T. 345-346, 411-417). Young Baugus had last been seen alive several days earlier by a playmate when they went to a ball field together. (T. 460-461).

An autopsy performed by Dr. Saleh Zaki showed that the victim had sustained abrasions and bruises on the neck extending to the larynx and upper chest, and a hemorrhage in the left eye. (T. 433-434). Bruises were also discovered on the head and there were fine hemorrhages in the coverings of the lung and heart. (T. 434-435). Due to the body's advanced stage of decomposition, Dr. Zaki could not determine the time of death, but did state the victim had been dead at least three days. (T. 443). The cause of death was asphyxiation due to neck trauma, probably strangulation, according to Dr. Zaki. (T. 435).

The State's main witness and Petitioner's girlfriend, Linda Cook, testified that she had known both Petitioner and the victim. (T. 349-350). Ms. Cook stated that on April 13, 1979, Petitioner led her to the railroad tracks where she saw the body of Dewey Baugus lying on his stomach. (T. 351-352). Ms. Cook noticed that Petitioner had blood on his pants. (T. 350). Petitioner told her that he had killed Baugus. (T. 352). Petitioner then turned the boy's body over and proceeded to jump on the victim's neck. (T. 352). He told Ms. Cook that he had to make sure that Baugus was dead. (T. 352). He then threw the body into some bushes. (T. 352). Ms. Cook further testfied that Petitioner said he had choked and beaten the victim with a stick. (T. 380).

Petitioner's stepfather, Enzor Lowe, testified that both Ms. Cook and Petitioner told him that Petitioner had killed a boy. (T. 387, 390). Lowe further stated that Petitioner had been grinning when he admitted the killing and that he (Lowe) did not believe Petitioner. (T. 390).

Glenda Wilborn, the victim's mother, stated that she had last seen her son the evening of April 11th when he left home with a playmate. (T. 469). On April 12th, Linda Cook came to stay with Ms. Wilborn, but the Petitioner came by later that day to get Ms. Cook. (T. 471-472).

After police were informed by Ms. Cook that Petitioner had thrown his bloodied pants behind his Primrose Circle apartment, Detective Guy Lloyd found a pair of stained pants in the area described by Ms. Cook. (T. 355, 401-402, 403).

An examination of the pants by a forensic serologist revealed that the stain was blood of human origin. (T. 464-465).

Following the State's evidence, the defense rested its case without presenting any witnesses or evidence. (T. 496).

In the sentencing phase, the State introduced copies of an indictment plea and sentence of the Petitioner to child molestation (R. 557, 588, 589, 590) and introduced copies of an accusation plea and sentence of the Petitioner to the charge of aggravated assault with intent to rape. (T. 558, 591, 592, 593, 594).

The Supreme Court of Georgia affirmed the Petitioner's conviction and sentence on April 23, 1980. Thereafter, the Petitioner filed this Application for Writ of Certiorari.

REASONS FOR NOT GRANTING THE WRIT

I.

THE TRIAL COURT WAS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE THE PETITIONER WITH AN EVIDENTIARY HEARING ON THE ISSUE OF COMPETENCY TO STAND TRIAL UNDER THE CIRCUMSTANCES OF THE INSTANT CASE.

In the instant case, three psychiatric evaluations of the Petitioner were performed by Order of the trial court. The first evaluation was reported to the trial court in the letter of Lloyd T. Baccus, M.D., dated June 4, 1979, which in substance indicated that the Petitioner was at that time, incompetent to stand trial. (See Appendix to Petition, pp. 9a, 10a). The second evaluation was done by Sheldon B. Cohen, M.D., and was reported to the trial court by letter on August 8, 1979. (See Appendix to Petition, pp. 11a,12a). The report, in substance, could not reach a definitive diagnosis as to the Petitioner's competence to stand trial. Dr. Cohen's report noted that there was a conflict between the information gathered in his observation of the Petitioner and the prior evaluation and speculated that this may have been caused by the effect of a prescribed tranquilizer, or ". . . that he may have simulated more in the previous interview than he did today." Dr. Cohen then recommended extended observation at Central State Hospital to clarify these factors.

The Petitioner had filed on June 25, 1980, a Special Plea of Incompetency to Stand Trial and a Motion for Transfer of Defendant to The Department of Human Resources. (See Appendix to Petition, pp. 13a, 14a). On August 10, 1979 the trial court issued an Order transferring the Petitioner to the Department of Human Resources. (See Appendix of Petition, p. 15a).

On September 2,4 1979, Jose M. Delatorre, M.D., reported to the trial court by letter in substance that based on the examination and evaluation conducted at Central State Hospital, that the Petitioner was competent to stand trial.

The Petitioner then went to trial on a general plea of not guilty on October 22, 1979. (T. 17).

It is apparent from the evidence before the trial court both prior and during the trial in the instant case that the quantum of evidence necessary to trigger a competency proceedings requiring an evidentiary hearing was not reached.

The general considerations in measuring this quantum of evidence necessary to trigger a competency procedure requiring an evidentiary hearing are (1) A history of irrational behavior; (2) the Defendant's demeanor at trial, (3) along with prior medical opinion. Chenault v. Stynchombe, 546 F.2d 1191 (5th Cir. 1977), cert. denied 434 U.S. 878.

The resolution of this issue by necessity requires an individualized analysis. Jackson v. Caldwell, 461 F.2d 682 (5th Cir. 1972), cert. denied 409 U.S. 991 (1973). The Fifth Circuit Court of Appeals has noted in the case of Grissom v. Wainwright, 494 F.2d 30 (5th Cir. 1974) that extensive hearings and thorough psychiatric examinations are not vital prerequisites to the prosecution of every criminal case. Indeed, low intelligence or weird behavior cannot be equated with mental incompetency to stand trial. McCune v. Estelle, 434 F.2d 611 (5th Cir. 1976).

Comparing the instant case with analgous proceedings under 18 U.S.C.A. 4244, it is clear that where a trial court had ordered a psychiatric evaluation and report, and that report indicated that the defendant was competent to stand trial, that no evidentiary hearing would be required. United States v. Greier, 521 F.2d 597 (5th Cir. 1975). As such, the trial court in the instant case took appropriate affirmative steps to examine the competency of the Petitioner within the constitutional parameters as set out in Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975). It can be seen from the report dated September 24, 1979 from Dr. Delatorre of Central State Hospital that there was insufficient evidence before the trial court to raise a bona fide and reasonable doubt as to the defendant's competency to be tried at the given point in time.

Therefore, the trial court was not required to hold an evidentiary hearing on the issue of the competency of the Petitioner to stand trial and as such, none of the Petitioner's constitutional rights have been violated in this regard.

II.

THE PETITIONER'S DEATH SENTENCE DOES NOT VIOLATE THE CONSTITUTIONAL PRINCIPLES SET FORTH IN GODFREY V. GEORGIA.

In the instant case the Petitioner was sentenced under the jury's finding of the aggravating circumstance given in Ga. Code Ann. § 27-2534.1(b)(7). This Court in Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759 (1980) found that § (b)(7) was unconstitutionally applied in that case. A review of some of the facts of the instant case shows that it is at the core rather than the periphery of the universe of murder cases and as such is distinquishable from Godfrey.

The victim in the instant case was a nine year old boy whose body weighed only fifty-seven pounds and was only fifty-one inches tall. (T. 432). The kind of force applied to strangle this boy, as seen from Dr. Zaki's testimony, is strong evidence of torture when it is applied to such a small frame. (T. 441). While this amount of force might not constitute torture to a full grown man, it is certainly strong evidence of such when it is applied to a little boy. Added to this is the disarray of the victim's clothes, including the victim's blue jean pants which had been lowered to mid-thigh which were evidence of a sexual assault. (T. 432, 347).

Further, in the instant case there is the testimony that the Petitioner took a witness, Linda Cook, out to the scene of the crime and proceeded to jump on the neck of the body. (T. 349 - 352). This is strong evidence of the inhuman way in which this killing was done and of the depravity of mind of the Petitioner at the time of the killing.

Therefore, under the facts of this case it is clear that this murder is a type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the Defendant and torture to the victim. See Hance v. State, ___ Ga. ___, Case. No. 36012 (decided June, 1980).

III.

THE JURY WAS PROPERLY SELECTED UNDER THE PRINCIPLES OF WITHERSPOON V. ILLINOIS.

This Court has made it clear that a state may constitutionally exclude veniremen from a jury who make it unmistakably clear, (1) That they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) That their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt. Witherspoon v. Illinois, 391 U.S. 511, 522-523, n. 21.

The Petitioner complains of alleged Witherspoon violations concerning the prospective jurors, Frances Ogletree, Joyce Beachum, Eddie Watkins, Christine Reese and Evelyn Thompson, (See Appendix to Petition, pp. 54(a) - 74(a)). A review of the testimony of these prospective jurors shows that each was properly excused under the Witherspoon rule.

Further, assuming arguendo that one juror was improperly exluded, this would have been under the facts of the instant case, harmless error. In a capital case in Georgia, the defense has twenty peremptory challenges and the State has ten. Ga. Code Ann. § 59-805. In the Petitioner's case, when the twelfth juror was selected (T. 323), the State had only exercised nine peremptory strikes. (T. 315, 318, 319, 320, 322, 323).

This Court has denied Application for Certiorari in the case of Alderman v. State, 241 Ga. 496, cert. denied, ___ U.S. ___, 99 S.Ct. 593 (1979) where the Georgia Supreme Court has ruled that the possession of remaining peremptory strikes by the State renders an equal number of jurors stricken for cause in violation of the Witherspoon rule harmless.

The Fifth Circuit Court of Appeals has ruled that this Court's decisions, especially Davis v. Georgia, 429 U.S. 122 (1976), rev'g. 236 Ga. 804 (1976) require that a Witherspoon violation cannot be found to be harmless error. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979); Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979).

The Respondent submits that the interpretation by the Fifth Circuit Court of Appeals would have the decisions of this Court place an undue restriction on the application of a harmless error principle. The Fifth Circuit has construed Davis v. Georgia, supra to hold that the exclusion of one venireman on grounds at variance with the Witherspoon standard was fatal, and this although the State may have gone to trial with one peremptory challenge unexercised, Burns v. Estelle, supra at 1299. This Court in Davis v. Georgia, did not discuss the possibility of peremptory challenges. The dissent in Davis merely noted that there may have been peremptory challenges unexercised. The issue of peremptory challenges was not involved in the decision of Davis and the Respondent submits that the Fifth Circuit Court of Appeals' reliance on Davis for this point is unwarranted.

Therefore, the Petitioner's constitutional rights with regard to the selection of the jury have not been violated.

CONCLUSION

For all the foregoing reasons, this Court should decline to grant the Petition for Writ of Certiorari filed by Donald Wayne Thomas.

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